Supreme Court, U.S.
FILED

02 - 22 JUN 2 7 2002

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GREGORY ROGGEMAN - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Russell Schroeder, Jr.
SCHROEDER LAW OFFICE
507 Clark Street
Charles City, IA 50616-1911
(641) 228-7611

QUESTION PRESENTED FOR REVIEW

Is it constitutionally permissible to subject a person to a pat-down search when that person's vehicle is stopped because of a faulty muffler and that person has a small bulge in his front pants pocket?

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

CONCLUSION 6

INDEX TO APPENDICES

APPENDIX A (32 pages) A1

APPENDIX B (19 pages) B1

APPENDIX C (38 pages) C1

APPENDIX D (1 page) D1

TABLE OF AUTHORITIES CITED

Cases — Page

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 3
Lego v. Twomey, 404 U.S. 477 (1972) 3
Pennsylvania v. Mimms, 434 U.S. 106 (1977) 4
Terry v. Ohio, 392 U.S. 1 (1968) 3,4,6
United States v. $84,000 United States Currency, 717 F.2d 1090 (7th Cir. 1983) 5
U.S. v. Baker, 78 F.3d 135 (4th Cir. 1996) 5
U.S. v. Brooks, 2 F.3d 838 (8th Cir. 1993) 5
U.S. v. Campbell, 843 F.2d 1089 (8th Cir. 1988) 5
U.S. v. Elsoffer, 671 F.2d 1294 (11th Cir. 1982) 5

Statutes

18 U.S.C. §3231 3
18 U.S.C. §3731 3
28 U.S.C. §1254(1) 1

Other

U.S. CONST. amend. IV, cl. 1 3

OPINIONS BELOW

1. The opinion of the United States Court of Appeals appears at Appendix A to the petition and is reported at 279 F.3d 573 (8th Cir. 2002).
2. The opinion of the United States District Court appears at Appendix B to the petition and is unpublished.
3. The opinion of the United States Magistrate appears at Appendix C to the petition and is unpublished.
4. The Order Denying Rehearing and Order Denying Rehearing En Banc appears at Appendix D and is unpublished.

BASIS OF JURISDICTION

The judgment sought to be reviewed was entered on February 1, 2002 by the United States Court of Appeals for the Eighth Circuit.

The Order Denying Rehearing was entered on March 29, 2002 by the United States Court of Appeals for the Eighth Circuit. A copy of the Order Denying Rehearing appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. ß1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. IV, cl. 1: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ...

STATEMENT OF THE CASE

On September 7, 2000 just before midnight, Iowa State Patrol Trooper Moore stopped defendant's pickup for a muffler violation. Defendant Roggeman was stopped in Mason City, Iowa and said stop was proper. The stop occurred in the well-traveled residential area of town and other vehicles passed by during the stop. Several individuals were in the area of the stop. While it was dark, the trooper had three lighting sources, which he employed. Those lighting sources were his flashlight, the headlights of the patrol car and the spotlight on the patrol car.

The trooper approached the driver's side of the defendant's truck and defendant rolled down the window. The trooper asked for defendant's driver's license, proof of insurance and registration. Defendant provided all of those items to the trooper.

At the trooper's request, Roggeman stepped out of the vehicle to accompany him to the trooper's vehicle. The trooper observed a bulge in Roggeman's right pants pocket. The size of the bulge was approximately the size of a hockey puck or a cigarette lighter according to the testimony of the trooper.

Trooper Moore testified he was merely curious about what was causing the bulge. Trooper Moore patted down only the one pocket. He was not, by his own admission, concerned for his safety when he allowed Roggeman to later remain unhandcuffed and allowed Roggeman freedom of movement.

At the suppression hearing the trooper testified that he had no reason to conclude that the object in the pocket was a weapon.

The United States District Court for the Northern District of Iowa had jurisdiction over the federal prosecution of the defendant pursuant to 18 U.S.C. ß3231.

The United States Court of Appeals for the Eighth Circuit had jurisdiction of the appeal pursuant to 18 U.S.C. §3731.

ARGUMENT

On February 1, 2002 a majority of a panel of judges of the United States Court of Appeals, Eighth Circuit, issued a ruling reversing and remanding the above matter to the United States District Court for the Northern District of Iowa, which had sustained Roggeman's Motion to Suppress in the above matter.

It is respectfully submitted that the District Court ruling, per the Honorable Chief Judge Mark W. Bennett, should have been affirmed.

The Government has the burden of proving that there is an applicable exception to the warrant requirement. Coolidge v. New Hampshire, 403 U.S. 443 (1971). The standard of proof placed upon the Government is a preponderance of the evidence. Lego v. Twomey, 404 U. S. 477 (1972).

In Terry v. Ohio, 392 U.S. 1 (1968) the United States Supreme Court stated that a frisk or a pat-down of an individual is in fact a search of that individual.

In Terry, at page 27, the Court stated as follows: "A police officer may search an individual's outer clothing to discover weapons when the officer reasonably believes that the individual may be armed and presently dangerous."

Therefore, the question before this Court is whether or not Trooper Moore had that reasonable belief.

The majority on the Eighth Circuit panel in this case relied heavily on Pennsylvania v. Mimms, 434 U.S. 106 (1977). However, in that case at page 107 this Court clearly concluded that there was "a large bulge" under the motorist's sports jacket. That is clearly different from the case at bar. In this case there was, in fact, a small bulge in Roggeman's right front pants pocket.

The ruling of the United States Court of Appeals for the Eighth Circuit in this case clearly would extend the boundaries for the Terry pat-down search.

It is submitted that applying the objective standard of Terry requires one to conclude that the search in this case was in fact an illegal search and violated Roggeman's Fourth Amendment Constitutional Rights.

An examination of the facts of this case supports the factual findings and conclusions of Magistrate Judge Paul A. Zoss, Chief Judge Mark W. Bennett and the dissenting opinion of Justice Gerald W. Heaney.

It is respectfully submitted that Trooper Moore failed to provide sufficient information as to why he had reasonable grounds to believe Roggeman was armed and dangerous and no such grounds existed. The trooper's only reason for suspecting Roggeman of carrying a weapon was that there was some small object in his pocket. One of the most striking facts in this case is that Roggeman had complete freedom of movement after having only one pocket patted down by the trooper.

It is submitted that there are not specific and articulable facts to conduct this search. Cases cited in the majority opinion of the Eighth Circuit panel are distinguishable from the facts in the instant case. See United States v. Baker, 78 F.3d 135, 136-137 (4th Cir. 1996) (There was a large triangular shaped bulge near the waistband of defendant's pants.); United States v. Brooks, 2 F.3d 838, 841-842 (8th Cir. 1993) (The defendant was suspected of armed robbery.); United States v. $84,000 United States Currency, 717 F.2d 1090, 1097-1099 (7th Cir. 1983) (A bulge was in defendant's boot where weapons were often hidden, defendant fit a drug profile and acted suspiciously in an unlit area.); United States v. Elsoffer, 671 F.2d 1294, 1295, 1299 (11th Cir. 1982) (Defendant had a bulge the size of a book in the front of his trousers which extended from his waistline down to his crotch).

As stated by the dissent of Justice Heaney, "The bulge in Roggeman's pants was small, and located in his front pocket, not in an area where a gun would commonly be concealed, such as the waistband of his pants, his jacket, or the top of his boot. Roggeman was not suspected of anything other than driving a car with a faulty muffler. He was not acting suspiciously." Justice Heaney correctly stated that "almost everyone carries something in their pocket."

A subjective suspicion premised upon a particular officer's training and experience is not enough. U.S. v. Campbell, 843 F.2d 1089, 1093-94 (8th Cir. 1988). (Emphasis added). Officers must be acting on more than a mere hunch. United States v. Baker, 78 F.3d 135, 136-137 (4th Cir. 1996).

Perhaps the dissent of the Honorable Justice Gerald W. Heaney sums this case up best when he stated in conclusion "I do not believe that we have come to the point in this country where simply carrying a small object in one's pant's pocket should justify being subjected to pat-down searches by law enforcement personnel."

CONCLUSION

It is respectfully submitted that the United States Court of Appeals for the Eighth Circuit has expanded on the Terry decision to an unacceptable degree. Said court has rendered a decision on this federal constitutional issue that conflicts with previous relevant decisions of this court.

Russell Schroeder, Jr.
SCHROEDER LAW OFFICE
507 Clark Street
Charles City, IA 50616-1911
(641) 228-7611

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 01-1738

United States of America,	*	
	*	
Appellant,	*	
	*	Appeal from the
v.	*	United States District
	*	Court for the Northern
Gregory Roggeman,	*	District of Iowa.
	*	
Appellee.	*	

Submitted: October 2, 2001

Filed: February 1, 2002

Before BOWMAN, HEANEY, and BYE, Circuit Judges.

BOWMAN, Circuit Judge.

The United States appeals the District Court's grant of defendant Gregory Roggeman's motion to suppress all evidence seized from his person, pickup truck, and residence. A pat-down search of a bulge in

Roggeman's right-front pants pocket during a routine traffic stop led to a state trooper's initial seizure of marijuana and drug paraphernalia. The government argues that the trooper's pat-down was justified by reasonable suspicion that Roggeman was presently armed and dangerous and that the District Court thus erred in concluding that the pat-down violated the Fourth Amendment. We agree and therefore reverse and remand for further proceedings.

I.

Just before midnight on September 7, 2000, Gregory Roggeman was driving his pickup truck near his home in Mason City, Iowa. Iowa State Trooper Ryan Moore pulled up behind Roggeman's truck at a stop sign. When Roggeman accelerated away from the stop sign, Trooper Moore noticed the truck making unusually loud exhaust noises. He pulled Roggeman over to investigate a possible muffler violation.[1] Roggeman

[1]The record includes an audio videotape that a recording device in the trooper's patrol car made of the encounter. The recording begins just before the trooper pulls over Roggeman's truck and continues throughout the duration of the disputed pat-down search. The tape was admitted into evidence at the suppression hearing, and the transcript (with unnumbered pages) that the District Court made of the audio portion of the tape is included in the record on appeal.

was the only person in the truck; Trooper Moore was alone as well. The trooper walked up to the truck's driver's-side door and asked Roggeman through his open window for his driver's license. The trooper informed Roggeman that he had been stopped for having a faulty muffler. Roggeman admitted that the truck's muffler had a hole in it and told the trooper that he was heading home from a shop where he had been working on the truck.

Trooper Moore told Roggeman that he intended to issue him a warning for his muffler violation. He then requested that Roggeman "come back and have a seat in the patrol car." Tr. of Videotape. Trooper Moore testified at the suppression hearing that he makes it part of his "normal routine" to ask motorists to whom he intends to issue a citation or warning to come back to his patrol car. Tr. at 12. Almost immediately after the trooper asked Roggeman to exit his truck, the trooper started asking Roggeman whether he had any weapons. Roggeman said he did not.

The parties dispute, and the record does not make clear, the precise sequence of events from the time Trooper Moore asked Roggeman to come back to his patrol car to the time the trooper first patted Roggeman down. Significant disagreement also exists as to the number of pat-downs to which Trooper Moore subjected Roggeman.[2] Trooper Moore's testimony, however, was unequivocal and uncontradicted that his observation of the bulge in Roggeman's right-front pants pocket took place before he performed the pat-down. Moreover, the District Court adopted the magistrate judge's finding that the trooper "did, in fact, see the bulge before he patted Roggeman's pocket." United States v. Roggeman, No. CR00-3046-MWB, at 12 (N.D. Iowa Jan. 30, 2001) (Report and Recommendation).

---

[2]The District Court and magistrate judge did not make an express finding on this question. The magistrate judge's report seems to find implicitly that Trooper Moore conducted at least two pat-downs of Roggeman's right-front pants pocket before Roggeman got into the trooper's patrol car, see United States v. Roggeman, No. CR00-3046-MWB, at 4-5 (N.D. Iowa Jan. 30, 2001) (Report and Recommendation); however, both Trooper Moore's testimony and the videotape of the incident are ambiguous regarding whether, after Roggeman exited his truck but before he got into the patrol car, Trooper Moore patted him down only once or more than once. The parties' attorneys did not fully develop the trooper's testimony on this issue. (The government's brief inexplicably suggests that the number is three. See Br. of Appellant at 3.)

Most of the light on the scene came from the patrol car's headlights and spotlight, but the trooper also had a flashlight in his hand. Trooper Moore ran the beam of the flashlight over the door of the truck as Roggeman began opening it. Although the District Court and the magistrate judge do not mention it, it is readily apparent from the videotape that the trooper then ran his flashlight's beam over the front of Roggeman's torso and legs as he stepped from the truck. As Roggeman set foot on the ground and turned to walk toward the patrol car, the trooper shone the flashlight directly on both of Roggeman's front pants pockets.

The exact chronology again is unclear, but within several seconds after Roggeman opened his truck's door, Trooper Moore saw the bulge in Roggeman's right-front pants pocket. Trooper Moore testified that during his initial pat-down of the pocket he immediately recognized that the cause of the bulge was a plastic or "cellophane" bag (which, when removed from Roggeman's pocket, was found to contain the marijuana) and a marijuana pipe. Specifically, approximately 4.7 grams of marijuana, a marijuana pipe, and a lighter were fetched from Roggeman's pocket.[3]

---

[3]Although the record suggests that Roggeman removed the marijuana and marijuana pipe from his pocket himself and then surrendered it to the trooper,

After the trooper seized the contents of Roggeman's pocket, Roggeman and the trooper sat in the patrol car while the trooper wrote citations for the marijuana and marijuana pipe. By then, the trooper apparently had decided not to arrest Roggeman but only to conduct a complete pat-down search of Roggeman's person and then to search his truck before sending him on his way. While conducting these additional searches, Trooper Moore found more marijuana, a white powdery substance that he concluded was methamphetamine,and a bottle of inositol powder, an agent commonly used for diluting or "cutting" methamphetamine. He then arrested Roggeman. When officers carried out a search warrant at Roggeman's residence the next day, they found more marijuana, more drug paraphernalia, and an SKS assault rifle.

On October 26, 2000, a federal grand jury returned an indictment against Roggeman charging him with two counts: possessing methamphetamine with the intent to

---

the government apparently waived any argument it may have had that, from a Fourth Amendment standpoint, this surrender was voluntary. See Tr. at 75-77.

distribute, see 21 U.S.C. § 841(a)(1), (b)(1)(C) (1994 & Supp. V 1999), and being a convicted felon and unlawful user of a controlled substance in possession of a firearm, see 18 U.S.C. § 922(g)(1), (g)(3) (1994). After conducting an evidentiary hearing on Roggeman's motion to suppress, a magistrate judge filed a report recommending that the District Court grant the motion. Roggeman did not contest the legitimacy of the initial traffic stop, but the magistrate judge concluded that the state trooper's pat-down search of Roggeman for weapons after the initial stop violated his Fourth Amendment rights. The government filed several objections to the factual findings and legal conclusions supporting the magistrate judge's report and recommendation.

After conducting a de novo review of the record, the District Court adopted the report and recommendation with little modification. The court concluded that the pat-down search violated the Fourth Amendment because, when the trooper patted Roggeman down, he did not have a reasonable, articulable suspicion that Roggeman might be armed and dangerous. The court ordered that the marijuana and marijuana pipe the trooper seized during the pat-down search be suppressed. It also ordered the suppression of all evidence seized as a result of searches subsequent to the pat-down as the "fruit of the poisonous

tree." We reverse because we conclude that the pat-down was justified by reasonable suspicion.

II.

This appeal turns upon whether Trooper Moore's pat-down of Roggeman's right-front pants pocket was justified by reasonable suspicion.[4] The determination of whether a protective pat-down search for weapons was supported by reasonable suspicion is a mixed question of law and fact, which we review de novo. See Ornelas v. United States, 517 U.S. 690, 696, 699 (1996). We review the material findings of historical fact for clear error and "give due weight to inferences drawn from those facts" by the district court. Id. at 699.

---

[4]In addition to his argument that the pat-down was not justified by reasonable suspicion, Roggeman argued in his motion to suppress that the pat-down was unconstitutional because the trooper's subsequent seizure of the contraband in Roggeman's right-front pants pocket did not conform to the standards of the "plain feel" doctrine. See Minnesota v. Dickerson, 508 U.S. 366 (1993). After determining that the initial pat-down itself violated the Fourth Amendment, the magistrate judge's report concluded that this determination obviated any need to reach the "plain feel" issue. The District Court did not modify this conclusion, and neither party briefed Roggeman's "plain feel" argument on appeal. Since the issue is not before us, we do not address it.

The Fourth Amendment forbids searches and seizures that are unreasonable, Terry v. Ohio, 392 U.S. 1, 9 (1967), and "generally requires police to secure a warrant before conducting a search." Maryland v. Dyson, 527 U.S. 465, 466 (1999). A law-enforcement officer is nevertheless justified in making a limited, warrantless search for the protection of himself or others nearby in order to discover weapons if he has a reasonable, articulable suspicion that the person may be armed and presently dangerous. Terry, 392 U.S. at 30. Because the "sole justification" for such a search is the protection of the officer and others, its scope must be confined to a search reasonably designed to discover concealed weapons. Id. at 29; see also Adams v. Williams, 407 U.S. 143, 146 (1972) ("So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose."). Courts are required to apply an objective test to resolve the question whether reasonable, articulable suspicion justified a protective search. Terry, 392 U.S. at 22 (explaining that a test based on an officer's subjective, good-faith belief that the person is armed is an insufficient constitutional safeguard, for it would subjugate Fourth Amendment protections to the good faith of law-enforcement officers). Under this objective standard, the "officer need

not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. at 27.

The level of suspicion necessary to constitute reasonable suspicion that will, in turn, justify a protective pat-down search "is considerably less than proof of wrongdoing by a preponderance of the evidence" and "is obviously less demanding than that for probable cause." United States v. Sokolow, 490 U.S. 1, 7 (1989). Nevertheless, the Fourth Amendment requires "some minimal level of objective justification." Id.; accord Terry, 392 U.S. at 27 ("[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.").

Reasonable suspicion is not a "finely-tuned" or bright-line standard; each case involving a determination of reasonable suspicion must be decided on its own facts. Ornelas, 517 U.S. at 696; Terry, 392 U.S. at 29 ("[T]he limitations which the Fourth Amendment places upon a protective seizure and search for weapons . . . will have to be developed in the concrete factual circumstances of individual cases."); cf. United States v.

Cortez, 449 U.S. 411, 417 (1981) ("Terms like 'articulable reasons' and 'founded suspicion' are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise."). In order to determine whether the facts and circumstances surrounding a Terry search and seizure give rise to reasonable suspicion, "the totality of the circumstances—the whole picture—must be taken into account." Cortez, 449 U.S. at 417.

Here, the evidence supports a conclusion that Trooper Moore's initial pat-down search was justified by reasonable, articulable suspicion. Trooper Moore was alone, he stopped Roggeman late at night, and the scene of the stop was poorly lit. These facts go to officer safety, the seminal justification for the Supreme Court's development of the Terry stop. The Court explained in Terry that the great risks that investigatory detentions present to officer safety tip the scales balancing the government's interest in protecting law-enforcement officers against the individual's right to personal security in favor of finding limited, protective searches to be constitutional. See 392 U.S. at 22-27. In its previous decisions, this Court has concluded that the fact that a suspect was detained late at night by a lone officer in a poorly lit area adds to the reasonableness of an officer's conclusion that the person he has detained should be frisked for weapons. See United States v. Douglas, 964

F.2d 738, 740-41 (8th Cir. 1992); United States v. Buchannon, 878 F.2d 1065, 1067 (8th Cir. 1989) (concluding that, in addition to the fact that appellant was a large man wearing a long winter coat which might have concealed a weapon, the fact that the officer was alone lent support to a finding of objective reasonable suspicion); cf. United States v. Crittendon, 883 F.2d 326, 329 (4th Cir. 1989) (explaining that the facts that the "'hour was late, the street was dark, the officer was alone, and the suspected crime was a burglary, a felony that often involves the use of weapons'" supported its conclusion that the officer's stop and frisk of the defendant was supported by reasonable suspicion (quoting United States v. Moore, 817 F.2d 1105, 1108 (4th Cir.), cert. denied, 484 U.S. 965 (1987))). While the District Court minimized the significance of these facts, they nevertheless are present and lend some support to the conclusion that the pat-down of Roggeman was objectively reasonable. We also note that, rather than applying the totality-of-the-circumstances test required by Terry, the District Court considered these facts in isolation without incorporating its finding that Trooper Moore had seen the bulge in Roggeman's pocket before performing the pat-down. See United States v. Roggeman, No. CR00-3046, at 14-16 (N.D. Iowa Feb. 28, 2001) (Memorandum Opinion and Order).

Even if, therefore, we were to agree with the District Court's minimization of the legal significance of the fact that Trooper Moore was alone, the hour was late, and the lighting so poor the trooper felt a need to use a flashlight to obtain a good view of Roggeman, our determination that Trooper Moore's protective pat-down was justified by reasonable suspicion receives strong support from the District Court's own finding that the trooper observed the bulge in Roggeman's right-front pocket before he patted down that pocket. When determining whether the totality of the circumstances gave rise to reasonable suspicion justifying a protective Terry search, both this Court and our sister circuits consider a law-enforcement officer's observation of a bulge to be a substantial factor. See, e.g., United States v. Baker, 78 F.3d 135, 137 (4th Cir. 1996); United States v. Brooks, 2 F.3d 838, 842 (8th Cir. 1993), cert. denied, 510 U.S. 1137 (1994); United States v. $84,000 United States Currency, 717 F.2d 1090, 1098-99 (7th Cir. 1983), cert. denied, 469 U.S. 836 (1984); cf. United States v. Elsoffer, 671 F.2d 1294, 1299 (11th Cir. 1982) (concluding that unusual shape, size, and position of bulge on suspect's person "alone provided not only reasonable suspicion but also probable cause" for his arrest).

Indeed, the facts and circumstances surrounding the protective pat-down search of the motorist in

Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam), bear such striking resemblance to the facts of this case that Mimms would seem to require our reversal of the District Court's order. The Court in Mimms was called upon to decide two main questions: whether directing a motorist stopped for a minor traffic violation to step out of his vehicle was a constitutionallypermissible seizure, and, more importantly for our analysis, whether patting down the motorist because of a bulge in his jacket was infirm under the Fourth Amendment. The two police officers in Mimms pulled over an automobile for a routine traffic violation (having an expired license tag). Despite concededly having "no reason to suspect foul play from the particular driver at the time of the stop," id. at 109, one officer asked the driver to step out of the vehicle. The officer then noticed "a large bulge" under the motorist's sports jacket. Id. at 107. The officer frisked the driver out of concern that the bulge might be a weapon and seized a loaded handgun from his waistband.

The Supreme Court first concluded that under Terry the officer's seizure of the motorist by ordering him to exit his vehicle did not violate the Fourth Amendment, then treated the question of the propriety of the pat-down as a rather straightforward application of Terry as well. In deciding this second question, the Court summarily concluded that the pat-down search

precipitated by the officer's observation of the bulge under the driver's jacket was a reasonable search under the Fourth Amendment. There was, the Court stated, "little question the officer was justified" under the standard enunciated in Terry. Id. at 112. "The bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer. In these circumstances, any man of 'reasonable caution' would likely have conducted the 'pat-down.'" Id.

The similarities between the facts in the instant case and the facts in Mimms are readily apparent. Like the officers in Mimms, Trooper Moore stopped Roggeman for a minor traffic violation. Like them, he asked Roggeman to step out of his vehicle before having any reason to believe Roggeman might be armed and dangerous or involved in any sort of criminal activity. Then, after Roggeman began exiting his vehicle, but before the initial pat-down, Trooper Moore, using his flashlight, observed the bulge in Roggeman's right-front pocket. The bulge under the driver's sports jacket in Mimms was described as being "large." 434 U.S. at 107. Trooper Moore testified that the size and the shape of the bulge in Roggeman's pocket were factors that made him concerned that it might be a weapon. Tr. at 30-31, 39.

The District Court found that "Trooper Moore did not consider the bulge in defendant Roggeman's pants pocket to have been possibly made by a weapon" when he conducted the initial pat-down. United States v. Roggeman, No. CR00-3046, at 12. Though we believe that as a matter of law this finding would not preclude a determination that the pat-down was objectively reasonable,[5] in fact the finding is clearly erroneous. We

---

[5]As we have noted, we apply an objective test to determine whether a protective pat-down is supported by reasonable suspicion. Terry v. Ohio, 392 U.S. 1, 21-22 (1967). Such an objective inquiry does not, however, require us to ignore all evidence of Trooper Moore's thought processes at the time he patted down Roggeman. When conducting our objective, reasonable-suspicion analysis, we are required to put ourselves, as best we can, into the shoes of the officer who actually performed the protective search. Id. at 27, 30. Trooper Moore's conclusions during the initial moments of his stop of Roggeman are at least some evidence of what a reasonable officer in Trooper Moore's position would have inferred from the facts and circumstances of the encounter. See Ornelas v. United States, 517 U.S. 690, 699 (1996) (explaining that, even though reasonable-suspicion and probable-cause determinations should be reviewed de novo, law-enforcement officers' inferences, drawn from the facts presented to them, are not irrelevant but should be accorded "due weight"). The Supreme Court's analysis of the reasonable suspicion supporting the officers' search and seizure in United States v. Cortez, 449 U.S. 411 (1981), makes it plain that an officer's conclusions drawn from the facts he encounters are a legitimate subject of inquiry. See id. at

418-21 (considering logical inferences that border patrol officers drew from facts known to them prior to a Terry stop and concluding that those inferences contributed to the legal justification for the stop); accord Terry, 392 U.S. at 21.

The ultimate test, of course, is not what the searching officer actually believed but what a hypothetical officer in exactly the same circumstances reasonably could have believed. The Supreme Court in Whren v. United States, 517 U.S. 806 (1996), for example, ruled that an officer's "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." Id. at 813. Whren and other Supreme Court cases with related holdings stand for the proposition that under Fourth Amendment analysis it is of no consequence "that the motivation for the search did not coincide with the legal justification" for the search. Scott v. United States, 436 U.S. 128, 138 (1978); cf. Graham v. Connor, 490 U.S. 386, 397 (1989) ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force ...."); United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983). These cases thus foreclose argument by a criminal defendant that an otherwise-justifiedsearch and seizure violates the Fourth Amendment because the legal justification—such as the probable cause arising from a minor traffic violation and justifying a traffic stop—was simply a pretext for law-enforcement officers to investigate their hunches regarding criminal activities unrelated to that legal justification.

But, for the reasons we already have explained, we are satisfied that in determining whether the pat-down of Roggeman's pocket was supported by an objectively reasonable, articulable suspicion, the objective approach the Supreme Court has mandated

are firmly convinced that this finding regarding Trooper Moore's state of mind at the time he patted down Roggeman cannot be upheld on this record read as a whole. See Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985) (explaining that a district court's finding of fact is not clearly erroneous if it is "plausible in light of the record viewed in its entirety").

Although the District Court and magistrate judge did not agree with some of Trooper Moore's conclusions from the facts and circumstances of the traffic stop and protective pat-down, neither one found or even suggested that Trooper Moore was not a credible witness. During Trooper Moore's testimony at the suppression hearing, the magistrate judge asked him directly about his state of mind at the time he patted Roggeman down. Trooper Moore's testimony was

---

does not make it irrelevant for us to inquire whether at the time of the pat-down Trooper Moore in fact suspected that Roggeman might be armed and dangerous. We emphasize the obvious: at the very least, it would militate against a conclusion that a search was supported by an objectively reasonable, articulable suspicion if in fact the searching officer, based upon his training, knowledge, and evaluation of the circumstances, did not believe it was possible that a bulge in the defendant's clothing was caused by a weapon, yet proceeded to search the defendant.

unequivocal throughout this line of questioning that he believed the bulge could have been caused by a weapon.

> THE COURT: Now, when you saw that bulge in the pocket, what went through your mind?
> THE WITNESS: It could be a possible weapon. I was definitely concerned about what it was.
> THE COURT: What kind of weapon?
> THE WITNESS: Be it a gun, a small caliber handgun in the pocket.
> THE COURT: It was of a size that would have been consistent in your mind with a small caliber handgun?
> THE WITNESS: Yes, sir.
>
> ...
>
> THE COURT: I will just ask you. Did you also think that it might be drugs when you saw the bulge in the pocket?
> TROOPER MOORE: I -- No, I didn't, Your Honor.
> THE COURT: So you thought weapon before drugs?
> TROOPER MOORE: Yes, sir.

Tr. at 36, 40. The government's attorney did not fully develop Trooper Moore's testimony on this issue during direct examination, but on re-direct the trooper again testified that the bulge caused him to be concerned that Roggeman might be armed. Trooper Moore was

concerned because of both the fact of and size of the bulge.

> [Mr. Williams:] So when he told you he didn't have any weapons, knives or anything like that on his person, did that alleviate all of the concern you had about whether he had a weapon in his pocket?
> [Trooper Moore:] No, it did not.
>
> ...
>
> [Q.] Did you have any concern about whether he had a weapon in his right pocket?
> [A.] Yes, I did.
> Q. And what was that based on?
> A. Based upon the bulge and the size of the bulge in his pocket.

Tr. at 30-31.

While the magistrate judge's comments during the suppression hearing are not evidence, we note here that his stated observations during the government's cross-examination of Roggeman are consistent with our conclusion that an officer with Trooper Moore's background and experience would have had a reasonable suspicion that Roggeman might be armed and dangerous. During one segment of the hearing, Roggeman attempted to demonstrate for the magistrate judge that the contents of his pocket on the night of his

arrest would not have produced a visible bulge. Tr. at 45-49, 59-61. Instead of using the actual marijuana pipe, however, Roggeman used a bolt which he repeatedly represented to the magistrate judge was the same size as the pipe seized from his pocket. Tr. at 46, 60. Upon viewing this bolt, the magistrate judge had, he said,

> no doubt that something the size of what you are displaying [the bolt], which is supposedly the size of the marijuana pipe, could be a weapon. It could be a knife. If the officer were able to observe that from the pocket, th[en] he would have justification to Terry search [sic].

Tr. at 53-54. He therefore cut off a line of questioning in which the government was attempting to establish that the size of the items in Roggeman's pocket was consistent with the size of a weapon. Id.

When the magistrate judge later examined the pipe actually seized from Roggeman, he found that the stem of the pipe was larger than the shaft of the bolt used in the courtroom demonstration and that the diameter of the pipe's bowl was almost twice the diameter of the bolt's head. Roggeman, No. CR00-3046-MWB, at 9-10. Although the magistrate judge's report expressed doubt that the size of the bulge would have been as large as the trooper described (i.e., a bulge

sticking out "approximately 2 or 3 inches," Tr. at 22-23), the report also found that "[i]t clearly would have been easier than it appeared in the courtroom demonstration for Trooper Moore to see that Roggeman had something in his pocket." Roggeman, No. CR00-3046-MWB, at 10.

The District Court cited two passages from the transcript of Roggeman's counsel's cross-examination of Trooper Moore to support its finding that the trooper, before patting down Roggeman, did not believe that he might be armed. Our review of the entirety of Trooper Moore's testimony, as well as of the entirety of the record, see Anderson, 470 U.S. at 573, leads us to conclude that in these two passages Trooper Moore was disclaiming that he had possessed actual knowledge that the bulge was a weapon. He was not disclaiming that he had been suspicious that a weapon might be causing the bulge. In the first passage the District Court cited,[6]

---

[6]Counsel for Roggeman questioned Trooper Moore:

> Q. And tell us, if you would, what reason there was that you believed this object you have now described was a weapon in that right front pocket.
> A. I didn't know what the object was. I wanted to know because it was dark and it is hard to visually observe what things are in the dark.

Roggeman's counsel asked the trooper for the reasons that he had "believed" that what he saw was a weapon. Tr. at 23. Trooper Moore's immediate reply was that he did not "know" what the object in Roggeman's pocket was. Id. Similarly, in the second passage cited by the District Court,[7] Roggeman's counsel again elicited the

---

> Q. Okay. So is it -- Would your testimony be -- Would I be correct if I said your testimony was you had no reason to believe it was a weapon, but you were curious as to what it was? Would that be fair?
> A. Yes, sir.

Tr. at 23.

[7]Roggeman's counsel again questioned the trooper:

> Q. Trooper Moore, you said he got out of the car and he had a bulge in his pocket and you described it. What made you think it was a weapon?
> A. Just I guess it was concealed in his pocket. I was curious as to what it was.
> Q. I understand you were curious. But it just as well could have been a billfold? Yes?
> A. It wasn't the shape of a billfold.
> Q. Well, could have been [sic] a hockey puck?
> A. Yes, sir.
> Q. Could have been [sic] a cigarette

trooper's testimony that the bulge could have been made by objects other than a weapon and that he had been "curious" as to what was causing the bulge. Focusing on these statements, the District Court concluded that "Trooper Moore was acting on nothing but a 'hunch' or subjective belief unsupported by objective facts." Roggeman, No. CR00-3046, at 13-14. We are firmly convinced that this is not a conclusion that a reasonable reading of the Trooper's testimony can

---

lighter?
A. Yes, sir.
Q. And so my question is: He gets out of the car, you see this bulge. Again, I'll ask you, give me one reason that you thought this was a weapon. Just one.
A. Based upon my training, the way it looked in his pocket, it possibly could have been a weapon.
Q. Okay. How did it look like a weapon when you saw a bulge in his pocket? How did it look like a weapon?
A. Just the shape of the object, it made me curious as to what it was.
Q. Okay. So it didn't look like a weapon, the shape of it made you curious?
A. Yes, sir.
Q. And so you have no reason to conclude that it is a weapon other than he has got an object in his pocket, am I right?
A. That's correct. Yes.

Tr. at 39-40.

support. Though Trooper Moore never stated that he was certain that Roggeman was armed, throughout his testimony he continued to assert that he had suspected that Roggeman might have a weapon in his pocket and to explain the rational basis supporting this suspicion. See, e.g., Tr. at 39 ("Q. . . . 'How did it look like a weapon?' A. 'Just the shape of the object, it made me curious as to what it was.'"). For a protective pat-down search to be justified, it is not necessary that the officer have been absolutely certain that the suspect was armed. Terry, 392 U.S. at 27. All the Fourth Amendment requires is objectively reasonable suspicion. The trooper's testimony in the portions of his cross-examination relied upon by the District Court in no way detracts from his consistent testimony that he had been concerned that Roggeman might have a weapon in his pocket.

Trooper Moore's explanation of his reasons for believing a weapon might be causing the bulge in Roggeman's pocket was not particularly articulate, but the trooper never backed away from the thrust of his entire testimony: that upon seeing the bulge in Roggeman's pocket, he was concerned that Roggeman might be carrying a weapon. Terry does not require the law-enforcement officer performing the search to state the reasons justifying the search articulately, only that such reasons be articulable. See United States v. Tharpe,

536 F.2d 1098, 1101 (5th Cir. 1976) (en banc) ("Terry cannot be read to condemn a pat-down search because it was made by an inarticulate policeman . . . , so long as it is clear that he was aware of specific facts which would warrant a reasonable person to believe he was in danger."), overruled in part on other grounds, United States v. Causey, 834 F.2d 1179 (5th Cir. 1987) (en banc). Here, the facts and circumstances would have justified a reasonable officer in believing that the bulge might be a weapon, and that is all that Terry and its progeny require.

Because the initial pat-down was limited to the right-front-pocket area where Trooper Moore saw the bulge, the search was reasonable in scope, and for the reasons we already have given, was supported by an objectively reasonable, articulable suspicion that the bulge might have been caused by a weapon in Roggeman's pocket. Accordingly, the search and the resulting seizure of evidence were reasonable, and none of Roggeman's Fourth Amendment rights were violated.

III.

For the reasons stated, the District Court's order granting Roggeman's motion to suppress all the seized evidence is reversed, and the case is remanded for further proceedings consistent with this opinion.

HEANEY, Circuit Judge, dissenting.

I agree with the majority's conclusion that all relevant circumstances must be considered when determining whether Trooper Moore had a reasonable suspicion to pat-down Roggeman's right-front pants pocket. Moreover, because I am convinced that this is precisely what the district court did in suppressing the fruits of the search, I would affirm.

The district court determined that the circumstances surrounding Trooper Moore's pat-down search did not provide reasonable, articulable suspicion to justify the search. At the suppression hearing, Trooper Moore failed to provide any information that would justify rejecting this assessment. When Roggeman was stopped, the scene of the stop was poorly lit, and Trooper Moore testified that he could not see the bulge in Roggeman's pants clearly enough to suspect that it was a weapon. Specifically, when Trooper Moore was asked why he believed Roggeman had a weapon in his right front pocket, he replied as follows:

> A: I didn't know what the object was. I wanted to know because it was dark and it is hard to visually observe what things are in the dark.

> Q: Okay. So . . . [w]ould I be correct if I said your testimony was that you had no reason to believe it was a weapon, but you were curious as to what it was? Would that be fair?
>
> A: Yes, sir.

Transcript at p. 23.

Later, when Trooper Moore was asked why he thought the bulge in Roggeman's pocket might be a weapon, he responded: "[I]t was concealed in his pocket. I was curious as to what it was." Id. at 39. Thereafter, Trooper Moore admitted that the only reason he suspected Roggeman of carrying a weapon was because he had an object in his pocket. Id. at 40.

The majority has thoroughly reviewed Trooper Moore's testimony, and has determined that Trooper Moore unequivocally testified that he believed the bulge in Roggeman's pocket might have been a weapon. I must respectfully disagree with the majority's assessment of the testimony. At various times during his testimony, Trooper Moore indicated that the size and shape of the bulge in Roggeman's pocket led him to conclude that the bulge might be a weapon. Yet, at other times, Trooper Moore indicated that he couldn't clearly see the bulge, and that he had no reason to suspect that a weapon was present. Even when asked directly,

Trooper Moore failed to indicate why the size and shape of the bulge led him to conclude it could have been a weapon, other than to vaguely assert that his training and experience led him to conclude that it "possibly could" be a weapon. Tr. at 39-40. Despite the uncertain nature of Trooper Moore's testimony, the majority asserts that he "was unequivocal that he believed the bulge could have been caused by a weapon" and that any statements indicating otherwise were meant to "disclaim[] that he had possessed actual knowledge that the bulge was a weapon." I cannot accept the majority's analysis. Trooper Moore's testimony, when read as a whole, was equivocal. At times Trooper Moore stated that he believed Roggeman might be armed, while at other times he indicated that he did not have any reason to believe that Roggeman was armed, and that he was merely curious as to what was in Roggeman's pants. Therefore, there is no reason to conclude that the district court's analysis of the import of this testimony was clearly erroneous.

In my view, the passages cited above represent the crux of Trooper Moore's testimony: it was dark; Trooper Moore saw a small bulge in Roggeman's pants pocket; he didn't know what the bulge was; he was curious because it theoretically could have been a weapon; but, he did not observe anything specific to cause him to suspect that the bulge was being created by a weapon.

The Supreme Court has made clear that an officer's "reasonable belief" that a suspect is armed and dangerous must be based on "specific and articulable" facts before he conducts a pat-down search. Terry v. Ohio, 392 U.S. 1, 21 (1968). None of the cases cited by the majority, including Mimms, indicate that the presence of a small amorphous bulge in the front pocket of a pair of pants, alone, provides reasonable suspicion that a suspect is armed. Cf. Pennsylvania v. Mimms, 434 U.S. 106, 107 (1977) (noting that a **large** bulge in jacket of a suspect permitted an officer to conclude that the suspect was armed, justifying a pat-down search); United States v. Baker, 78 F.3d 135, 136-137 (4th Cir. 1996) (noting that an officer had a reasonable belief that a bulge in a suspect's waistband could have been made by a weapon when the officer clearly observed a "**triangular shaped bulge** underneath the front of [the suspect's] shirt, **near the waistband of his pants**") (emphasis added); United States v. Brooks, 2 F.3d 838, 841-842 (8th Cir. 1993)(holding that officers had a reasonable, particularized suspicion to conduct a pat-down search when they observed a noticeable bulge in the right front pants pocket of an individual **who was suspected of participating in a recent armed robbery**); United States v. $84,000 United States Currency, 717 F.2d 1090, 1097-1099 (7th Cir. 1983) (holding that a pat-down search was justified when officers observed a bulge in the top of a

suspect's boot because the bulge was in area where "weapons are often secreted;" the suspect's appearance and conduct conformed with a DEA drug courier profile; the suspect exhibited "furtive and anxious movement" throughout an airport terminal; and the officers were alone with the suspect and his accomplice in a "compact, dark non-public area illuminated only by 'Exit' signs"); United States v. Elsoffer, 671 F.2d 1294, 1295, 1299 (11th Cir. 1982) (holding that officers had probable cause to arrest an individual in an airport because the individual had a bulge "shaped like a good-sized softbound book on the front of [his] trousers from waistline to crotch").

The facts of the cases cited above are distinguishable from the facts of this case. The bulge in Roggeman's pants was small, and located in his front pocket, not in an area where a gun would commonly be concealed, such as the waistband of his pants, his jacket, or the top of his boot. Roggeman was not suspected of anything other than driving a car with a faulty muffler. He was not acting suspiciously. By itself, the simple observation of the bulge in Roggeman's pocket did not provide reasonable suspicion to conduct a pat-down search. Something more was needed, as almost everyone carries something in their pocket. A subjective suspicion premised upon a particular officer's training and experience is not enough. See U.S. v. Campbell, 843

F.2d 1089, 1093-94 (8th Cir. 1988) ("[O]fficers must be acting on facts directly relating to the suspect or the suspect's conduct and not just on a 'hunch' or on circumstances which 'describe a very broad category of predominantly innocent travelers'") (citation omitted); Baker, 78 F.3d at 137 ("An officer's belief must be based not on subjective hunches but on information sufficient to cause a reasonably prudent person under the circumstances to believe that either his safety or that of others is in danger") (citations omitted).

Here, the record is devoid of any facts which would suggest to a reasonably prudent person that the bulge was a concealed weapon. I do not believe that we have come to the point in this country where simply carrying a small object in one's pants pocket should justify being subjected to pat-down searches by law enforcement personnel. Therefore, I must dissent.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. GREGORY ROGGEMAN, Defendant.	No. CR00-3046 **MEMORANDUM OPINION AND ORDER REGARDING MAGISTRATE'S REPORT AND RECOMMENDATION CONCERNING DEFENDANT'S MOTION TO SUPPRESS**

TABLE OF CONTENTS

I. INTRODUCTION AND BACKGROUND.....2

II. LEGAL ANALYSIS.....3
A. Standard of Review.....3
B. Objections to Findings of Fact.....3
1. The Government's First Factual Objection.....4
2. The Government's Second Factual Objection.4
3. The Government's Third Factual Objection.....4
4. The Government's Fourth Factual Objection..5
5. The Government's Fifth Factual Objection.....5
6. The Government's Sixth Factual Objection.....8
7. The Government's Seventh Factual Objection8
8. The Government's Eighth Factual Objection...9
C. Objections Regarding Conclusions of Law.....9
III. CONCLUSION.....16

I. INTRODUCTION AND BACKGROUND

On October 26, 2000, a two-count indictment was returned against defendant Gregory Roggeman, charging him with possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. §§ 841 (a)(1) and 841(b)(1)(C), and possession of a firearm by an unlawful user of controlled substances and being a felon in possession of a firearm, in violation of 21 U.S.C. §§ 922(g)(1) and 922(g)(3).

On January 8, 2001, defendant Roggeman filed a motion to suppress (#17). In his motion, defendant Roggeman seeks to suppress evidence seized from his person, his vehicle and his residence. Defendant Roggeman asserts, *inter alia,* that after the pickup truck he was driving was stopped for an equipment violation, an Iowa State Patrol Trooper unlawfully conducted a pat-down search of his person. Defendant Roggeman further contends that because the pat-down of his person was illegal, all evidence subsequently found in his pick-up truck and home must be suppressed as fruit of the poisonous tree. Defendant Roggeman's motion to suppress was referred to United States Magistrate Judge Paul A. Zoss, pursuant to 28 U.S.C. § 636(b), for the purpose of holding an evidentiary hearing and preparing a Report and Recommendation on the motion. On January 19, 2001, an evidentiary hearing was held regarding defendant Roggeman's motion to suppress. On January 30, 2001, Judge Zoss filed a Report and Recommendation in which he recommends that defendant Roggeman's motion to suppress be granted. The government filed objections to Judge Zoss's Report and Recommendation on February 13, 2001. The government has filed both several factual objections to Judge Zoss's Report and Recommendation, as well as a

number of objections to the legal conclusions reached by Judge Zoss in his Report and Recommendation. The court, therefore, undertakes the necessary review of Judge Zoss's recommended disposition of defendant Roggeman's motion to suppress.

II. LEGAL ANALYSIS

A. Standard Of Review

Pursuant to statute, this court's standard of review for a magistrate judge's report and recommendation is as follows:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). Similarly, Federal Rule of Civil Procedure 72(b) provides for review of a magistrate judge's report and recommendation on dispositive motions and prisoner petitions, where objections are made, as follows:

> The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b).

As noted above, the government has filed objections to Judge Zoss's Report and Recommendation. The court, therefore, undertakes the necessary review of Judge Zoss's recommended disposition of defendant Roggeman's motion.

B. Objections To Findings Of Fact

The court will address each of the government's factual objections *seriatim.*

1. The Government's First Factual Objection

First, the government objects to the lack of a factual finding that defendant Roggeman was acting nervous at the time of the traffic stop. Although the government asserts that this point of Iowa State Patrol Trooper Ryan Moore's testimony was "uncontroverted," the court notes that defendant Roggeman testified at the evidentiary hearing that he did not act nervous when he was stopped. Tr. at p. 45. The court's own audio and visual review of the videotape of the traffic stop supports defendant Roggeman's testimony. He does not sound nervous when responding to Trooper Moore's questions. Although Roggeman later became agitated when Trooper Moore patted him down, he was not acting nervous when he got out of the cab of his pick-up truck. Therefore, this factual objection is denied.

2. The Government's Second Factual Objection

The government next objects to the lack of a factual finding that Trooper Moore was alone while conducting the traffic stop of defendant Roggeman. Trooper Moore was alone when he stopped defendant Roggeman's pick-up truck for a loud muffler violation. Therefore, this objection is sustained.

3. The Government's Third Factual Objection

The government also objects to the finding in the report and recommendation that when Trooper Moore asked defendant Roggeman if he had any weapons, he did so in a "routine manner." The government contends that this characterization implies that Trooper Moore did not have a realistic concern that defendant Roggeman had a weapon. The court does not conclude that the fact that Trooper Moore asked defendant Roggeman about his possession of weapons in a "routine manner" implies that Trooper Moore did not have a realistic concern that defendant Roggeman had a weapon. Indeed, it implies nothing whatsoever, but merely characterizes the manner in which Trooper Moore made his inquiry. Therefore, this objection is also denied.

4. The Government's Fourth Factual Objection

The government next objects to Judge Zoss's finding regarding the sequence of events surrounding Trooper Moore's pat down of defendant Roggeman. The government asserts that Trooper Moore saw the bulge before he asked defendant Roggeman if he had any weapons, then asked him about weapons and then patted down defendant Roggeman's pocket. The court's review of the videotape leads it to conclude that Trooper Moore began asking defendant Roggeman if he had any weapons before he could have seen the bulge in defendant Roggeman's right pants pocket. Trooper Moore begins to inquire about weapons before defendant Roggeman has completely exited the cab of his pick-up truck. Thus, the court concludes that Trooper Moore did not see the bulge before he asked defendant Roggeman if he had any weapons but,

rather, asked him about weapons, then saw the bulge in his pocket, and then patted him down. Therefore, this objection is denied.

5. ***The Government's Fifth Factual Objection***

The government next objects to Judge Zoss's characterization that Trooper Moore's testimony, about his suspicions over whether defendant Roggeman might be armed, was "inconsistent." The court notes that during his direct testimony, Trooper Moore testified that the reason he patted down defendant Roggeman was "[b]ecause I was concerned about the bulge that was protruding from his pocket." Tr. at p. 14. Then, on cross-examination, Trooper Moore testified as follows:

> Q. And tell us, if you would, what reason there was that you believed this object you have now described was a weapon in that right front pocket.
>
> A. I didn't know what the object was. I wanted to know because it was dark and it is hard to visually observe what things are in the dark.
>
> Q. Okay. So is it--Would your testimony be—Would I be correct if I said your testimony was you had no reason to believe it was a weapon, but you were curious as to what it was? Would that be fair?
>
> A. Yes, sir.

Tr. at p. 23. On redirect questioning, Trooper Moore provided the following testimony:

Q. Did you have any concern about whether he had a weapon in his right pocket?

A. Yes, I did.

Q. And what was that based on?

A. Based on the bulge and the size of the bulge in his pocket.

Tr. at pp. 30-31. Subsequently, the following colloquy occurred between Trooper Moore and Judge Zoss:

Q. Now, when you saw that bulge in the pocket, what went though your mind?

A. It could be a possible weapon. I was definitely concerned about what it was.

Q. What kind of weapon?

Q. Be it a gun, a small caliber handgun in the pocket.

Tr. at p. 36. Later, during re-cross examination, the following exchange occurred:

Q. Trooper Moore, you said he got out of the car and he had a bulge in his pocket and you described it. What made you think it was a weapon?

A. Just I guess it was concealed in his pocket. I was curious as to what it was.

Q. I understand you were curious. But it just as well could have been a billfold? Yes?

A. It wasn't the shape of a billfold.

Q. Well, could have been a hockey puck?

A. Yes, sir.

Q. Could have been a cigarette lighter?

A. Yes, sir.

Q. And so my question is: He gets out of the car, you see this bulge. Again, I'll ask you, give me one reason that you thought this was a weapon. Just one.

A. Based on my training, the way it looked in his pocket, it possibly could have been a weapon.

Q. Okay. How did it look like a weapon when you saw a bulge in his pocket? How did it look like a weapon?

A. Just the shape of the object, it made me curious as to what it was.

Q. Okay. So it didn't look like a weapon, the shape of it made you curious?

A. Yes, sir.

Q. And so you have no reason to conclude that it is a weapon other than he has got an object in his pocket, am I right?

A. That's correct. Yes.

Tr. at pp. 39-40.

The court concludes that Trooper Moore's testimony regarding his suspicions over whether defendant Roggeman might be armed was equivocal. Therefore, this objection is denied.

6. The Government's Sixth Factual Objection

The government next objects to Judge Zoss's finding that Trooper Moore began asking defendant Roggeman if he had any weapons before he saw the bulge in defendant Roggeman's right pants pocket. As was noted above, the court's review of the videotape leads it to conclude that Trooper Moore began asking defendant Roggeman if he had any weapons before he could have seen the bulge in defendant Roggeman's right pants pocket. Trooper Moore begins to inquire about weapons before defendant Roggeman has completely exited his vehicle. Therefore, this objection is also denied.

7. The Government's Seventh Factual Objection

The government further objects to Judge Zoss's allegedly drawing a "negative factual conclusion" from the fact that Trooper Moore misstated the law to defendant Roggeman concerning Trooper Moore's right to pat down Roggeman. In his report and recommendation, Judge Zoss does not explicitly rely on Trooper Moore's falsehood to defendant Roggeman in reaching his legal conclusions or making his factual findings. Therefore, the court finds no basis to conclude that Judge Zoss made any "negative factual conclusion" from the fact that Trooper Moore misstated the law to defendant Roggeman during the traffic stop. Therefore, this objection is also denied.

8. The Government's Eighth Factual Objection

The government further objects to Judge Zoss's allegedly drawing a "negative inference" from Trooper Moore's failure to pat down the rest of defendant Roggeman until after he had issued citations to Roggeman. Judge Zoss noted Trooper Moore's failure to pat down the rest of defendant Roggeman until after he had issued citations in his discussion over whether Trooper Moore had a concern for his safety. The court concludes that the fact that Trooper Moore only patted down the one pocket before issuing citations is a legitimate fact to consider in analyzing whether Trooper Moore was concerned for his safety. Therefore, this objection is denied.

C. Objections Regarding Conclusions Of Law

The government objects to Judge Zoss's conclusion that Trooper Moore violated defendant Roggeman's Fourth Amendment rights when he conducted the pat-down of Roggeman. The government asserts that Trooper Moore had a reasonable, articulable, basis to suspect that defendant Roggeman might have had a weapon and therefore was entitled to pat-down Roggeman for weapons. The government further contends that Judge Zoss employed a subjective test in determining whether the pat-down was justified.[1]

---

[1]While Judge Zoss noted Trooper Moore's lack of subjective suspicion, the court concludes that Judge Zoss applied an objective test in determining that Trooper Moore lacked reasonable suspicion to conduct a pat-down search of defendant Roggeman. Therefore, this objection is denied.

Judge Zoss concluded in his report and recommendation that Trooper Moore lacked reasonable suspicion to frisk defendant Roggeman for weapons. In *Warren v. City of Lincoln, Neb.*, 864 F.2d 1436 (8th Cir.) (en banc), *cert. denied*, 490 U.S. 1091 (1989), the Eighth Circuit Court of Appeals noted that the Supreme Court has identified three categories of police-citizen
encounters, each justifying a different level of detention:

> The first category consists of consensual communications between officers and citizens, involving no coercion or restraint of liberty. Such encounters do not constitute seizures and thus are beyond the scope of the fourth amendment. *See Florida v. Royer*, 460 U.S. 491, 497, 103 S. Ct. 1319, 1323, 75 L. Ed. 2d 229 (1983). The second category is the so-called *Terry* stop, *see Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1879-80, 20 L. Ed. 2d 889 (1968); *Florida v. Royer*, 460 U.S. at 498-99, 103 S. Ct. at 1324-25, pursuant to which an officer having a reasonable suspicion that a person has committed or is about to commit a crime may temporarily seize the person for limited investigative purposes. Finally, there are full-scale arrests, which must be supported by probable cause. [*United States*] v. *Poitier*, 818 F.2d 679, 682 [(8th Cir.1987), *cert. denied*, 484 U.S. 1006, 108 S. Ct. 700, 98 L. Ed. 2d 651 (1988).]

Id. at 1438-39.

Here, the second category of police-citizen encounters is at issue. The standards used to consider

whether reasonable suspicion exists are well defined, although sometimes problematic to apply:

> The standard of articulable justification required by the fourth amendment for an investigative, *Terry*-type seizure is whether the police officers were aware of "particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant[ed] suspicion that a crime [was] being committed." *United States v. Martin*, 706 F.2d 263, 265 (8th Cir. 1983); *see also Terry*, 392 U.S. at 20-21, 88 S. Ct. at 1879-80. In assessing whether the requisite degree of suspicion exists, we must determine whether the facts collectively establish reasonable suspicion, not whether each particular fact establishes reasonable suspicion. "[T]he totality of the circumstances--the whole picture--must be taken into account." *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621 (1981). We may consider any added meaning certain conduct might suggest to experienced officers trained in the arts of observation and crime detection and acquainted with operating modes of criminals. *See United States v. Wallraff*, 705 F.2d 980, 988 (8th Cir. 1983). It is not necessary that the behavior on which reasonable suspicion is grounded be susceptible only to an interpretation of guilt, *id*; however, the officers must be acting on facts directly relating to the suspect or the suspect's conduct and not

> just on a "hunch" or on circumstances which "describe a very broad category of predominantly innocent travelers." *Reid v. Georgia*, 448 U.S. [438] at 440- 41, 100 S. Ct. [2752] at 2754 [65 L. Ed. 2d 890 (1980)]; *United States v. Sokolow*, 831 F.2d 1413 (9th Cir. 1987), [rev'd on other grounds, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989)].

United States v. Campbell, 843 F.2d 1089, 1093 (8th Cir. 1988); *see United States v. Gray*, 213 F.3d 998, 1000 (8th Cir. 2000) ("When determining whether a police officer had reasonable suspicion of criminal activity, we must view the totality of the circumstances 'as understood by those versed in the field of law enforcement.'") (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)); *United States v. Beck*, 140 F.3d 1129, 1136 (8th Cir. 1998) (holding that "[t]he standard of articulable justification required by the fourth amendment for an investigative, *Terry*-type seizure is whether the police officers were aware of 'particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant[ed] suspicion that a crime [was] being committed.'") (quoting *United States v. Martin*, 706 F.2d 263, 265 (8th Cir. 1983)); *United States v. Dawdy*, 46 F.3d 1427 (8th Cir. 1995) (holding that "[f]or a *Terry* stop to be considered valid from its inception, 'the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'") (quoting *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880).

More specifically, with respect to searches for weapons, the Eighth Circuit Court of Appeals has instructed that:

> A police officer may search an individual's outer clothing to discover weapons when the officer reasonably believes that the individual may be armed and dangerous. *Terry*, 392 U.S. at 27, 30, 88 S. Ct. at 1883, 1884; *Sibron [v. New York]*, 392 U.S. [40,] *1323 63-64, 88 S. Ct. [1889] at 1903 [20 L. Ed. 2d 917] [(1968)]. In determining whether the officer acted reasonably in such circumstances, we give due weight "to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."

United States v. Ward, 23 F.3d 1303, 1306 (8th Cir. 1994) (quoting *Terry*, 392 U.S. at 27).

Applying these principles to evaluate the circumstances known to Trooper Moore at the time he patted-down defendant Roggeman, the court finds that, while a close question, the facts known to Trooper Moore were insufficient to have aroused a reasonable, articulable suspicion on his part that defendant Roggeman might be armed and therefore pose a serious safety risk to Trooper Moore. Although a law enforcement officer's obserance of a bulge in an individual's article of clothing that could be made by a weapon reasonably warrants a belief that the suspect is potentially dangerous, even if the suspect was stopped only for a minor violation, *see Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977) (per curiam) ("The bulge in the jacket permitted the officer to conclude that [the suspect] was armed and thus posed a serious and present danger to the safety of the officer."), here, Trooper Moore did not consider the bulge in defendant Roggeman's pants pocket to have been possibly made by a weapon at the time he patted-down defendant Roggeman. Rather, the court finds

that Trooper Moore was merely curious as to what was causing the bulge. This conclusion is exemplified by Trooper Moore's testimony at the evidentiary hearing:

Q. And tell us, if you would, what reason there was that you believed this object you have now described was a weapon in that right front pocket.

A. I didn't know what the object was. I wanted to know because it was dark and it is hard to visually observe what things are in the dark.

Q. Okay. So is it--Would your testimony be—Would I be correct if I said your testimony was you had no reason to believe it was a weapon, but you were curious as to what it was? Would that be fair?

A. Yes, sir.

Tr. at p. 23. Although the government attempted to rehabilitate Trooper Moore on re-direct, Trooper Moore again conceded on re-cross that he was merely curious about what was causing the bulge in defendant Roggeman's pants pocket:

Q. Trooper Moore, you said he got out of the car and he had a bulge in his pocket and you described it. What made you think it was a weapon?

A. Just I guess it was concealed in his pocket. I was curious as to what it was.

Q. I understand you were curious. But it just as well could have been a billfold? Yes?

A. It wasn't the shape of a billfold.

Q. Well, could have been a hockey puck?

A. Yes, sir.

Q. Could have been a cigarette lighter?

A. Yes, sir.

Q. And so my question is: He gets out of the car, you see this bulge. Again, I'll ask you, give me one reason that you thought this was a weapon. Just one.

A. Based on my training, the way it looked in his pocket, it possibly could have been a weapon.

Q. Okay. How did it look like a weapon when you saw a bulge in his pocket? How did it look like a weapon?

A. Just the shape of the object, it made me curious as to what it was.

Q. Okay. So it didn't look like a weapon, the shape of it made you curious?

A. Yes, sir.

Q. And so you have no reason to conclude

that it is a weapon other than he has got an object in his pocket, am I right?

A. That's correct. Yes.

Tr. at pp. 39-40. Based on this testimony, the court concludes that Trooper Moore was acting on nothing but a "hunch" or subjective belief unsupported by objective facts. *United States v. Green*, 52 F.3d 194, 198 (8th Cir. 1995); *United States v. Bloomfield*, 40 F.3d 910, 919 & n.10 (8th Cir.), *cert. denied*, 514 U.S. 1113 (1995); *United States v. Campbell*, 843 F.2d 1089, 1093 (8th Cir. 1988).

The government asserts that circumstances other than the observed bulge in defendant Roggeman's pants pocket give rise to reasonable, articulable suspicion. These additional circumstances include the time and location of the pat-down search, Trooper Moore conducting the stop by himself, and the nervousness of defendant Roggeman. *See United States v. Douglas*, 964 F.2d 738, 741 (8th Cir. 1992) (in holding that police officer's pat-down search of defendant after investigatory stop was justified the court found officer was warranted in belief that his safety was in danger in light of the fact that it was late at night, he was alone with defendant in dimly lit parking lot, and defendant was wearing long coat which could have concealed a weapon); *United States v. Crittendon*, 883 F.2d 326, 329 (4th Cir. 1989) ("The hour was late, the street was dark, the officer was alone, and the suspected crime was a burglary, a felony that often involves the use of weapons.") (quoting *United States v. Moore*, 817 F.2d 1105, 1108 (4th Cir. 1987)); *United States v. Tharpe*, 536 F.2d 1098, 1100 (5th Cir. 1976) (in holding that police officer was justified in conducting pat-down search the court considered fact that officer

was alone in a poorly lit area facing three men who had evidently been drinking). Taking the last of these circumstances first, the court concluded above that defendant Roggeman was not acting in a nervous manner when speaking with Trooper Moore. Thus, this circumstance in inapplicable here. Although it was shortly after midnight when Trooper Moore stopped defendant Roggeman's vehicle, the court notes that the stop occurred in a well traveled residential neighborhood in Mason City, Iowa. During the stop other vehicles passed by on the street and denizens of the neighborhood were nearby observing the stop. Thus, the time and location of the stop was insufficient to create reasonable suspicion. Finally, the fact that Trooper Moore was conducting the stop by himself is insufficient to support a frisk for weapons. Trooper Moore was confronted by only one individual, defendant Roggeman, who had been cooperative during the stop. Moreover, the stop was for a non-criminal offense, a motor vehicle equipment violation, and the individual was only blocks from his house, a fact that Trooper Moore would know as a resident of Mason City. Therefore, the court concludes that these other circumstances fail to give rise to a reasonable, articulable suspicion which would warrant a pat-down search of defendant Roggeman. The government's objections to Judge Zoss's legal conclusions are denied.

III. CONCLUSION

The court initially concludes that upon a *de novo* review of the record that Trooper Moore did not have a reasonable, articulable, suspicion that defendant Roggeman was armed or dangerous. Thus, the court concludes that Trooper Moore was not permitted

under the Fourth Amendment to conduct a pat-down of defendant Roggeman. The court, therefore, overrules the government's objections as to Judge Zoss's legal conclusions and accepts that portion of Judge Zoss's Report and Recommendation. Defendant Roggeman's motion to suppress is **granted** and all evidence seized from his person, his vehicle and his residence is hereby suppressed.

IT IS SO ORDERED.

DATED this 28th day of February, 2001.

/s/ Mark W. Bennett
MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

Copies mailed on 2/28/01
to counsel of record or pro se
parties as shown on the docket
sheet.
/s/JKJos
Deputy Clerk

APPENDIX C
IN THE UNITED STATES DISTRICT COURT
OR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. GREGORY ROGGEMAN, Defendant.	No. CR00-3046-MWB **REPORT AND RECOMMENDATION ON MOTION TO SUPPRESS**

TABLE OF CONTENTS

I. INTRODUCTION 1
II. FACTUAL BACKGROUND 3
A. The Traffic Stop 3
B. The Parties' Arguments 10
III. LEGAL ANALYSIS 13
IV. CONCLUSION 16
APPENDIX: Transcript of Videotape

I. INTRODUCTION

The defendant Gregory Roggeman ("Roggeman") was indicted on October 26, 2000, for possession of methamphetamine with the intent to deliver, and for being an unlawful user of controlled substances, and a felon in possession of a firearm. (*see* Doc. No. 1) On January 8, 2001, Roggeman filed a Motion to Suppress and supporting brief (Doc. Nos. 17 & 18). The plaintiff (the "Government") filed a brief in resistance to the motion on January 16, 2001 (Doc. No. 21). Under the trial scheduling and management order entered November 2, 2000 (Doc. No. 6), motions to suppress in

this case were assigned to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition.

Accordingly, on January 19, 2001, the court held a hearing on the suppression motion. Assistant United States Attorney C.J. Williams appeared on behalf of the Government. Roggeman appeared in person and with his attorney, Russell Schroeder, Jr. The Government presented the testimony of Iowa State Trooper Ryan Moore ("Trooper Moore"). Roggeman testified on his own behalf. Exhibits admitted by the Court were Government Exhibit 1, a videotape of the traffic stop in question; Government Exhibit 2, a hand-drawn, not-to-scale drawing of the location of the traffic stop and surrounding area in Mason City, Iowa; Defense Exhibit A, consisting of a written statement by Officer Logan D. Wernet in support of the application for a warrant to search Roggeman's residence; and Defense Exhibit B, an evidence bag containing a metal bolt approximately 3.5" long; a baggie containing 4.7 grams, more or less, of chewing tobacco; and a silver-colored cigarette lighter with a half-moon and mountains on the front.

Subsequently, the Court received into evidence for purposes of this motion the original items seized from Roggeman's pocket, including a baggie containing 4.7 grams, more or less, of marijuana, and a small pipe of a type Trooper Moore testified is commonly used to smoke marijuana. This evidence was provided for the Court's inspection by law enforcement officer Lori Lewis, and was immediately returned to Officer Lewis's possession. The cigarette lighter included as part of Defense Exhibit B also was in Roggeman's pocket at the time of the traffic stop.

The court has reviewed the parties' briefs and carefully considered the evidence, and now considers the motion ready for decision.

II. FACTUAL BACKGROUND

A. The Traffic Stop

Roggeman seeks to suppress all evidence arising from a search of his person, vehicle, and residence. The pertinent facts are as follows. On September 7, 2000, just before midnight, Trooper Moore was heading home at the end of his shift. He was driving behind Roggeman's pickup truck, proceeding eastbound on 3rd Street Northeast in Mason City, Iowa. Roggeman stopped at a stop sign. When he started up again, Trooper Moore noticed Roggeman's muffler was very loud. Trooper Moore stopped Roggeman because the trooper believed the loud muffler was in violation of Iowa law. The traffic stop occurred in a residential area of town. Roggeman testified there were people outside on their porches or in their yards on the nearby corners, watching the traffic stop. He said Trooper Moore talked to one of the observers at some point during the stop. The videotape confirms several individuals were in the area; they are shown walking back and forth in front of Roggeman's truck. Trooper Moore talked briefly to an unidentified individual who was out of camera range while the trooper was standing in the bed of Roggeman's pickup truck, searching the tool box.

Trooper Moore radioed to dispatch that he had "a little muffler problem here." He got out of his squad car and walked to the driver's side of Roggeman's truck. Roggeman rolled down the window. Trooper Moore asked Roggeman for his driver's license, insurance verification, and registration. Roggeman gave those items to the trooper. Trooper Moore asked,

"Where you heading to this fine evening?" Roggeman answered, "Right down the street to my house." Trooper Moore responded, "Okay. Just got off work, did you?" and Roggeman answered, "No. Just coming home from my shop, working on this truck a little bit. I was putting a new starter in it." The significance of the content of this initial exchange about Roggeman's activities will become clear later in this opinion.

Trooper Moore then asked Roggeman to get out of his truck and come back and sit in the squad car. The trooper testified it is his normal routine, absent some extenuating circumstances, to ask people he stops to get out of their vehicles and come back to his squad car while he finishes the stop (checking their license, writing out a ticket or warning, etc.) Trooper Moore backed away from the driver's side door to avoid the door as it swung out. He ran his flashlight over the side of the truck as Roggeman opened the driver's door. Trooper Moore testified he makes it a common practice "to visually observe" everyone he stops while they exit their vehicles, "for safety reasons." The trooper said he was standing about three to four feet from Roggeman as he got out of the truck, and the videotape confirms this fact. The trooper said the lighting in the area was provided by his hand-held flashlight, the headlights from his squad car, and a spotlight on his squad car. As Roggeman began to step from his vehicle, but before both his feet were on the ground, Trooper Moore began asking, in a routine manner, if Roggeman was carrying any weapons. He finished his question as Roggeman got out of the truck and began to walk back toward the squad car. Roggeman responded that he was not carrying any weapons.

At the time this exchange was taking place –

that is, while the trooper was asking if Roggeman had any weapons and while Roggeman was answering that he did not -- Trooper Moore was standing outside the camera range, to the left, and Roggeman was getting out of his truck, and then turning to walk back toward the squad car. For a brief moment, Roggeman's right side is not clear on the videotape. Roggeman stated, and Trooper Moore confirmed, that the trooper reached over and ran his hand down Roggeman's right side, over his right front pants pocket -- in effect, a quick "pat down" of that pocket. Trooper Moore testified he did so because he saw a bulge in Roggeman's pocket, and he was concerned Roggeman might be carrying a weapon. Trooper Moore testified he does not pat down every driver he stops, but bases his decision on "[s]everal things, be it in this case an object that is protruding from the pocket[.]" (Tr. page 15, lines 8-9) He later clarified that by "protruding," he meant he "could see a bump in his pocket." (Tr. page 22, lines 9-13) He stated the size of the bump was about the diameter of a baseball, and it stuck out about two to three inches. (Tr. page 22, line 17, through page 23, line 1)

Trooper Moore stated he did not know what the object was. He said he had no reason to believe the object was a weapon, but he was "curious" as to what it was because of its shape. (Tr. at page 23, lines 10-20; page 39, line 3, through page 40, line 1) He agreed he had no reason to conclude the object was a weapon other than the fact that Roggeman had something in his pocket. (Tr. page 40, lines 2-5)

As Trooper Moore patted down Roggeman's pocket, Roggeman finished responding that he had no weapons. Trooper Moore then said, "Why don't you come here for a second, I'm just going to pat your pockets down to make sure." Roggeman stopped next

to the left rear tire of the truck. He had taken about six steps toward the rear of the truck from the time he got out to the time the trooper told him to stop. The videotape shows Trooper Moore reached over and patted Roggeman's right front pocket, after which the following exchange took place (Quoted portions of the videotape are from the court's own transcription of that tape, a copy of which is attached to this Report and Recommendation.):

TROOPER MOORE:	What's that right there?
ROGGEMAN:	Huh?
TROOPER MOORE:	What is that?
ROGGEMAN:	My lighter.
TROOPER MOORE:	No, that baggie in there.
ROGGEMAN:	Baggie?
TROOPER MOORE:	There's a baggie in there.
	[Roggeman puts his hand in his pocket, turns toward the patrol car, and starts to walk toward the passenger side of the patrol car. He takes 3-4 steps.]
TROOPER MOORE:	C'mere. C'mere, c'mere, c'mere, c'mere, c'mere.
	[Roggeman turns and walks back to the trooper.]
TROOPER MOORE:	Be straight with me, what is it?
ROGGEMAN:	Why?
TROOPER MOORE:	I know what cellophane feels like.

ROGGEMAN: You got a warrant to be searching me for anything?

TROOPER MOORE: You know what? There's a thing that's called "plain feel," you know what? And I know what a baggie feels like, and I know what people put in a baggie, okay? It's usually –

ROGGEMAN: I know, but you pulled me over for a muffler and there's no right to be patting me down for nothing.

TROOPER MOORE: I can pat you down for weapons, okay? And when I feel a baggie –

ROGGEMAN: I don't have no weapons on me. You're not going to take my word for it?

TROOPER MOORE: For my own safety -- for my own safety I can pat you down, okay? Do you understand that?

ROGGEMAN: No, you cannot pat me down. I'm not under arrest or nothing, Officer.

TROOPER MOORE: I can pat you down for weapons, all right? For my own safety. And you know what? That's a bag of dope in your pocket.

ROGGEMAN: No, it is not.

TROOPER MOORE: Okay, what is it, then? Pull it out.

ROGGEMAN: It's a lighter.

TROOPER MOORE:	No, no, no, that right there. That right there is a bag of dope.
ROGGEMAN:	It's marijuana, sir.
TROOPER MOORE:	All right. Be straight with me.
ROGGEMAN:	I am. Right there, that's all I got on me.
TROOPER MOORE:	All right. Be straight with me and I'm an easy guy to get along with, okay?
ROGGEMAN:	I don't see how you can pat me down like that.
TROOPER MOORE:	I can pat you down for weapons, okay? And then when I can feel this right here, just by touching you –
ROGGEMAN:	I might as well give you my bowl, too, that I got.
TROOPER MOORE:	Yeah, give me that, too. Okay. I felt that in there, too. So, you know what? Be straight with me, okay?
ROGGEMAN:	I am.
TROOPER MOORE:	Sound good?
ROGGEMAN:	Yes, sir.
TROOPER MOORE:	Have a seat in the patrol car.

A few moments after they got into the patrol car, Trooper Moore told Roggeman that patting people down for weapons is "just a routine thing that I do, just for my own safety. We run into a lot of different people out here, Greg, you know? You know what I mean? And you can never be too careful."

Trooper Moore then began completing the paperwork incident to the traffic stop. While he was checking Roggeman's driver's license and writing him a warning for the muffler violation, the two had the following conversation:

TROOPER MOORE: . . . So you said you've got your own shop, do you, is that what you said?

ROGGEMAN: A friend of mine's shop.

TROOPER MOORE: Oh, who's that?

ROGGEMAN: Bill Wagner (phonetic).

TROOPER MOORE: Bill Wagner (phonetic), don't know him.

ROGGEMAN: Across from Route 65 over there, kitty corner.

TROOPER MOORE: Okay, I know what you're talking about.

Later in their conversation, the trooper and Roggeman returned to the issue of the pat-down, and the following exchange took place:

ROGGEMAN: And I didn't mean -- I just -- didn't mean to be jumpy out there like that, but I was just wondering why you -- how you can do that to me.

TROOPER MOORE: We can pat down everybody for our own safety for weapons, okay? And when I reach in there and I can feel this right here, it feels like a pot pipe and it feels like a bag of dope, okay? And that's what they call "plain feel." There's a law on "plain feel," okay? And based on

my training, I've arrested enough people that have had a pot pipe and a bag of dope in their pocket, okay, that's what I knew exactly what it was when I grabbed it. I mean, there's not too many things that feel like a pot pipe, okay.

ROGGEMAN: I know, but it seems like I didn't even get a chance to answer your question –

TROOPER MOORE: No –

ROGGEMAN: -- if I had anything and you just started patting me down. I never had that happen to me before.

TROOPER MOORE: I do it all the time.

The trooper later testified his statements to Roggeman about a police officer's right to pat down anyone for the officer's own safety was not an accurate statement of his legal authority. He said he made those statements to Roggeman as "just kind of a reassuring thing" because Roggeman was upset and he wanted to avoid further confrontation. (Tr. at page 31, line 9, through page 32, line 9)

During the hearing, Roggeman performed a demonstration designed to show how noticeable the "bulge" in his pocket actually was. Roggeman testified he was wearing the same blue jeans, shirt and belt he was wearing on the night he was stopped. At his counsel's request, he stood and walked around so the court could observe him. He then removed from his pocket a cigarette lighter, which he stated was the same

lighter found in his pocket on the night in question; a baggie containing 4.7 grams, more or less, of chewing tobacco; and a metal bolt which he said was exactly the same size as the pipe he had in his pocket that night. The court noted it was nearly impossible to tell Roggeman had anything at all in his pocket, and the court expressed surprise when he removed those items from his pocket.

For purposes of comparison, the parties agreed the Government would deliver to the court for examination the original baggie, marijuana, and pipe seized from Roggeman by Trooper Moore. When those items were examined and compared with the items submitted by Roggeman, the court found the volume of the dry marijuana was somewhat less than the volume of the moist chewing tobacco. The pipe, however, was nearly twice as big in diameter at the large end of the stem as the metal bolt's diameter. Similarly, the bowl on the pipe was nearly twice as big as the end of the metal bolt. It clearly would have been easier than it appeared in the courtroom demonstration for Trooper Moore to see that Roggeman had something in his pocket, although it is doubtful the items would have created a bulge of the size the trooper described (*i.e.*, a bulge that stuck out "approximately 2 or 3 inches").

Trooper Moore wrote Roggeman a warning for the muffler violation, and citations for possession of marijuana and possession of paraphernalia. He set a court date, and planned to release Roggeman to go on his way. When they got out of the patrol car, Trooper Moore said that because he had found the marijuana and pipe on Roggeman's person, he was going to search Roggeman and his truck. In the course of that search, the trooper found additional contraband, and ultimately placed Roggeman under arrest for

possession of methamphetamine with intent to deliver, and possession of marijuana. A search warrant of Roggeman's house was obtained on the basis of the contraband located during the search of Roggeman and his truck.

B. The Parties' Arguments

The parties agree Trooper Moore had the right to stop Roggeman for the muffler violation, and had the right to ask Roggeman to get out of his vehicle and come back and sit in the squad car. Their disagreement concerns the trooper's right to conduct a nonconsensual pat-down of Roggeman's pocket.

Roggeman argues Trooper Moore reached over and patted his right side as Roggeman was walking toward the squad car without having any reasonable, articulable basis for suspecting Roggeman might be carrying a weapon. Both Roggeman and Trooper Moore agree the pat-down of Roggeman's pocket happened almost immediately after Roggeman got out of the truck. The question is whether Trooper Moore had sufficient time to observe a bulge in Roggeman's pocket, the size of which would raise a reasonable, articulable suspicion that Roggeman might be armed. The question is compounded by the trooper's testimony that he really was not concerned the bulge was a weapon, but he was curious about what it was.

Adding to the dilemma is the Government's reliance upon an erroneous chronology of the events that occurred during the stop. The Government repeatedly emphasized the fact that Trooper Moore was suspicious from the outset because of Roggeman's description of his activities. Trooper Moore testified Roggeman said he had been at his friend's shop located at 14th and North Federal, and he was on his way

home. The trooper said based on where he stopped Roggeman, "[i]t appeared to be an indirect route to his residence," causing him to be concerned about whether Roggeman was telling him the truth. (Tr. page 11, line 21, through page 12, line 11; page 30, lines 6-11) In describing the totality of the circumstances that led to the trooper's concern about Roggeman's being armed, the Government relies heavily on the trooper's testimony that his suspicion already had been raised because he thought Roggeman might be lying about where he had been. *See, e.g.*, Tr. at page 67, line 11, through page 68, line 17; page 70, lines 6-15.

The videotape contradicts this version of the events. The tape clearly shows that initially, before he and the trooper got into the squad car, Roggeman only said he had been coming from his shop, working on his truck, and he was headed home. He did not give the location of the shop at that time. He never mentioned the location of the shop until much later, after the pat-down incident, when he was sitting in the squad car.

The erroneous characterization of events was continued into the affidavit supporting the application to search Roggeman's house. Officer Wernet's affidavit states, in pertinent part:

> On 09/07/00 I received a phone call from Iowa State Trooper Ryan Moore. Moore told me that at about 2348 hours, he stopped a vehicle at 5th and North Pennsylvania. The driver of the vehicle was Gregory Albert Roggeman. Roggeman got out of his vehicle and told the trooper he was coming from 14th and North Federal. The Trooper knew this was false as Roggeman was coming from the south.

(Def. Ex. B) Thus, the magistrate reviewing the warrant application was told the sequence of events began with Roggeman lying to the trooper about his activities.

The trooper's testimony regarding the exact sequence of events surrounding the initial pat-down of Roggeman's right pocket also is problematic. Trooper Moore testified, and the Government emphasized, that he asked Roggeman if he was carrying weapons before he touched Roggeman's pocket. The Government seemed to imply that Trooper Moore saw the bulge in Roggeman's pocket, then asked him if he had any weapons because of what he had seen, and then performed the cursory pat-down for his own safety. The videotape belies this version of the events. Trooper Moore began asking Roggeman if he had any weapons before both of Roggeman's feet even hit the ground, and before the trooper would have had any view of Roggeman's right pocket. He finished the question just as Roggeman got out of the truck, and Roggeman responded in the negative as he began walking back toward the squad car. It was during this time period that Trooper Moore reached over and patted down Roggeman's pocket.

Whether the trooper saw the bulge before the pat-down or not is unclear from the videotape. The court credits the trooper's uncontradicted testimony that he did, in fact, see the bulge before he patted Roggeman's pocket; however, the court still must determine if seeing the bulge was enough for the immediate, nonconsensual pat-down. The trooper initially testified he was not concerned the object was a weapon, but he was curious as to what it was. On redirect examination, the trooper later testified

he was, in fact, concerned the object might be a weapon. The court finds this inconsistent testimony to be troubling, especially in light of the trooper's repeated statements to Roggeman that he had the right to pat down anyone for his own safety, and the immediacy of the pat-down when Roggeman got out of his truck.

In summary, the first clear question in this case is whether the pat-down was legal. If it was not, then all the evidence flowing from it must be suppressed as fruit of the poisonous tree. If the pat-down was legal, however, a second question arises; that is, whether the trooper's detection of a plastic bag in Roggeman's pocket was sufficient to justify further search after the trooper learned Roggeman was not carrying a weapon.

III. LEGAL ANALYSIS

The analysis begins with the Fourth Amendment's guarantee of a person's right to be secure against unreasonable searches and seizures of his or her person, house, papers and effects. The United States Supreme Court has held repeatedly that "searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions." *Minnesota v. Dickerson*, 508 U.S. 366, 372, 113 S. Ct. 2130, 2135, 124 L. Ed. 2d 334 (1993) (internal quotation marks, citations omitted).

One such exception was recognized by the Court in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). *Terry* considered the right of a police officer to stop and inquire of a person engaging in suspicious activity which

leads the officer to believe a crime may be taking place. In that context, the Court further considered whether the officer making the inquiry can search the individual whose behavior is being investigated. The *Dickerson* Court explained the *Terry* holding as follows:

> "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a patdown search "to determine whether the person is in fact carrying a weapon." "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. . . ." Rather, a protective search – permitted without a warrant and on the basis of reasonable suspicion less than probable cause – must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed.

Dickerson, 508 U.S. at 373, 113 S. Ct. at 2136 (citations omitted) (quoting *Terry, supra*, 392 U.S. at 24, 26, 88 S. Ct. at 1881, 1882; *Adams v. Williams*, 407 U.S. 143, 145-46, 92 S. Ct. 1921, 1922-23, 32 L. Ed. 2d 612 (1972)). The officer's justification for conducting a *Terry*-type search must be reasonably based on "specific and articulable facts . . ., together with rational inferences from those facts." *Terry*, 392 U.S. at 21, 88 S. Ct. at 1868. The Court noted that "[t]his

demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id.* n.18.

The *Terry* court explained the duty of a reviewing court in considering the propriety of such a search:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. And simple "good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police.'

Terry, 392 U.S. at 21-22, 88 S. Ct. at 1880 (footnote, citations omitted).

This court does not doubt that Trooper Moore acted in good faith in patting down Roggeman's pocket; however, as explained by the *Terry* Court, good faith is not enough. The court finds Trooper Moore lacked a reasonable, articulable suspicion that Roggeman was armed and potentially dangerous. The trooper's curiosity about what Roggeman had in his pocket was not enough to justify the nonconsensual search. Indeed, the trooper's lack of concern for his own safety is evidenced by other factors. He did not pat down all of Roggeman's clothing, only one pocket; he allowed Roggeman to move about freely, and to enter and occupy the patrol car with him before conducting any additional search beyond the one pocket; and he allowed Roggeman to retain complete freedom of movement while the trooper conducted a thorough search of the vehicle, even after discovering additional contraband in Roggeman's other pockets. There is nothing to suggest the trooper at any time had a reasonable, articulable suspicion that Roggeman might be armed or dangerous.

Accordingly, the court **recommends** the defendant's motion to suppress be granted, and all the evidence seized from Roggeman's person, his vehicle, and his home be suppressed. Because the court has found the initial pat-down was illegal, the court does not reach the "plain feel" issue regarding whether the trooper's discovery of a plastic bag in Roggeman's pocket was sufficient to justify a further search.

IV. CONCLUSION

IT IS RECOMMENDED, unless any party files objections (Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).) to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this report and recommendation, that the defendants' motion to suppress evidence (Doc. No. 19) be **granted**, in accordance with the Court's recommendations set forth above.

IT IS SO ORDERED.

DATED this 30th day of January, 2001.

/s/Paul A. Zoss
PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

Copies mailed on 1/30/01
to counsel of record or pro se
parties as shown on the docket
sheet.
/s/JKJos
Deputy Clerk

TRANSCRIPT OF VIDEOTAPE
TRAFFIC STOP OF GREG ROGGEMAN
SEPTEMBER 7, 2000

TROOPER MOORE: [Tape begins mid-sentence]. . . sounds like it could use a little bit of muffler work on it.

[Trooper exits patrol car, approaches driver's side window of pickup truck.]

Evening.

ROGGEMAN: [Sitting in driver's seat of truck] Hello.

TROOPER MOORE: Got your driver's license with you tonight?

ROGGEMAN: Yes, sir.

TROOPER MOORE: Reason I stopped you is when you step on the gas, sounds like you may need a little bit of muffler work done.

ROGGEMAN: Yeah, it's go a hole in it.

TROOPER MOORE: Oh, does it?

ROGGEMAN: Yes, sir, it does. [Unintelligible.]

TROOPER MOORE: [Unintelligible.] All right. What's your name?

ROGGEMAN: Greg Roggeman.

TROOPER MOORE: Okay.

ROGGEMAN: [Unintelligible.]

TROOPER MOORE: Okay. Where you heading to this fine

evening?

ROGGEMAN: Right down the street to my house.

TROOPER MOORE: Okay. Just got off work, did you?
ROGGEMAN: No. Just coming home from my shop, working on this truck a little bit. I was putting a new starter in it.

TROOPER MOORE: Okay. If you don't mind, Greg, why don't you come back and have a seat in the patrol car and we'll just take care of you and get you on your way, all right?

ROGGEMAN: All right.

[Trooper Moore backs up away from driver's door; runs his flashlight over the door and the side of the truck as Roggeman opens the door and gets out.]

TROOPER MOORE: [Begins asking question after door is open, just as Roggeman puts left foot out, and continues asking while he exits vehicle and starts to walk back towards patrol car.] [Unintelligible] . . .any knives --

ROGGEMAN: No.

TROOPER MOORE: -- guns, knives, anything like that?

ROGGEMAN: No.

TROOPER MOORE: Why don't you come here for a second, I'm just going to pat your pockets down to make sure.

[Roggeman stops next to the left rear tire of the truck. He had taken about six steps toward the rear of the truck before he stopped. Trooper reaches over and pats down Roggeman's right front pocket.]

TROOPER MOORE: What's that right there?

ROGGEMAN: Huh?

TROOPER MOORE: What is that?

ROGGEMAN: My lighter.
TROOPER MOORE:: No, that baggie in there.

ROGGEMAN: Baggie?

TROOPER MOORE: There's a baggie in there.

[Roggeman puts his hand in his pocket, turns toward the patrol car, and starts to walk toward the passenger side of the patrol car. He takes 3-4 steps.]

TROOPER MOORE: C'mere. C'mere, c'mere, c'mere, c'mere, c'mere.

[Roggeman turns and walks back to the trooper.]

TROOPER MOORE: Be straight with me, what is it?

ROGGEMAN: Why?

TROOPER MOORE: I know what cellophane feels like.

ROGGEMAN: You got a warrant to be searching me for anything?

TROOPER MOORE: You know what? There's a thing that's called "plain feel," you know what? And I know what a baggie feels like, and I know what people put in a baggie, okay? It's usually --

ROGGEMAN: I know, but you pulled me over for a muffler and there's no right to be patting me down for nothing.

TROOPER MOORE: I can pat you down for weapons, okay?

And when I feel a baggie --

ROGGEMAN: I don't have no weapons on me. You're not going to take my word for it?

TROOPER MOORE: For my own safety -- for my own safety I can pat you down, okay? Do you understand that?

ROGGEMAN: No, you cannot pat me down. I'm not under arrest or nothing, Officer.

TROOPER MOORE: I can pat you down for weapons, all right? For my own safety. And you know what? That's a bag of dope in your pocket.

ROGGEMAN: No, it is not.

TROOPER MOORE: Okay, what is it, then? Pull it out.

ROGGEMAN: It's a lighter.

TROOPER MOORE: No, no, no, that right there. That right there is a bag of dope.

ROGGEMAN: It's marijuana, sir.

TROOPER MOORE: All right. Be straight with me.

ROGGEMAN: I am. Right there, that's all I got on me.

TROOPER MOORE: All right. Be straight with me and I'm an easy guy to get along with, okay?

ROGGEMAN: I don't see how you can pat me down like that.

TROOPER MOORE: I can pat you down for weapons, okay? And then when I can feel this right here, just by touching you --

ROGGEMAN: I might as well give you my bowl, too, that I got.

TROOPER MOORE: Yeah, give me that, too. Okay. I felt that in there, too. So, you know what? Be straight with me, okay?

ROGGEMAN: I am.

TROOPER MOORE: Sound good?

ROGGEMAN: Yes, sir.
TROOPER MOORE: Have a seat in the patrol car.

ROGGEMAN: Okay. [Unintelligible] . . . carry a weapon? [Starts to get in patrol car.]

TROOPER MOORE: Watch where you sit. Why don't you hold on a second, don't sit down yet. I've got to -- I've got my hat right there. I wouldn't want you to ruin my hat.

Okay, jump on in here. [Roggeman gets in patrol car.]

No, it's just a routine thing that I do, just for my own safety. We run into a lot of different people out here, Greg, you know? You know what I mean? And you can never be too careful.

You don't have nothing else on you?

ROGGEMAN: No, sir.

TROOPER MOORE: This is it?

ROGGEMAN: Yeah.

TROOPER MOORE: Okay. Belmont 36, 27, 28 [unintelligible].

DISPATCH: 36.

TROOPER MOORE: 049-George-Boy-Charles, 049-George-Boy-Charles. 27's going to be on last name Roggeman, R-Robert, O-Ocean, double G-George, E-Edward, M-Mary, A-Adam, N-Nora. First name is Gregory, and A for Albert, 611021, sixty-one-ten-twenty-one. Also check CCH, ten two fifth northwest -- east, North Penn, ten ninety-five, ten two hundred.

DISPATCH: [Unintelligible]

TROOPER MOORE: Fifth northeast, North Penn, Mason City.

DISPATCH: Okay, ten four.

ROGGEMAN: I have my registration in the truck, sir.

TROOPER MOORE: Can run get her right after [unintelligible] right there.
You got a current insurance card, by any chance?

ROGGEMAN: I think that's in the visor.

TROOPER MOORE: Okay. I'll see if you can get that for me.

ROGGEMAN: I know it's up to date.

TROOPER MOORE: Okay. Today would be the 7th still, wouldn't it? So you said you've got your own shop, do you, is that what you said?

ROGGEMAN: A friend of mine's shop.

TROOPER MOORE: Oh, who's that?

ROGGEMAN: Bill Wagner (phonetic).

TROOPER MOORE: Bill Wagner (phonetic), don't know him.

ROGGEMAN: Across from Route 65 over there, kitty corner.

TROOPER MOORE: Okay, I know what you're talking about.

Before we go any further, Greg, I've got to -- do advise you of your rights. You do have the right to remain silent. Anything you say can and will be held against you in a court of law. If you -- You have the right to an attorney, and you have the right to have that attorney present during any questioning. If you cannot afford an attorney, the court systems will appoint you one. At any time, you can exercise these rights by not answering any questions or making any statements. Do you understand those rights?

ROGGEMAN: So I'm under arrest?
TROOPER MOORE: Well, I'm going to advise you of that right now.

ROGGEMAN: Okay.

TROOPER MOORE: You're being --

ROGGEMAN: I know my rights.

TROOPER MOORE: You're being decent with me, okay?

ROGGEMAN: Yes, sir.

TROOPER MOORE: And if you continue to be decent with me --

ROGGEMAN: I don't -- I don't believe in giving anybody a

hard time.

TROOPER MOORE: All right.

ROGGEMAN: And I didn't mean -- I just -- didn't mean to be jumpy out there like that, but I was just wondering why you -- how you can do that to me.

TROOPER MOORE: We can pat down everybody for our own safety for weapons, okay? And when I reach in there and I can feel this right here, it feels like a pot pipe and it feels like a bag of dope, okay? And that's what they call "plain feel." There's a law on "plain feel," okay? And based on my training, I've arrested enough people that have had a pot pipe and a bag of dope in their pocket, okay, that's what I knew exactly was it was when I grabbed it. I mean, there's not too many things that feel like a pot pipe, okay.

ROGGEMAN: I know, but it seems like I didn't even get a chance to answer your question --

TROOPER MOORE: No --

ROGGEMAN: -- if I had anything and you just started patting me down. I never had that happen to me before.
TROOPER MOORE: I do it all the time.

What I'm probably going to do, Greg, is, since you're being decent with me, and I'm going to cite you into court, if you can make a court date for me --

ROGGEMAN: Yes, sir, I've never missed one yet.

TROOPER MOORE: Okay. Good deal. 'Cause I know a lot of people like going to sleep in their own bed, okay. And as long as you're decent with me, I'll be decent with you, okay?

ROGGEMAN: Yes, sir.

TROOPER MOORE: Sound good?

ROGGEMAN: Yep.

TROOPER MOORE: Still living at 1022 North Georgia?

ROGGEMAN: Yes, sir.

TROOPER MOORE: When's the last time you smoked?

ROGGEMAN: This afternoon.

TROOPER MOORE: This afternoon?

ROGGEMAN: Yep.

TROOPER MOORE: You feeling it right now at all?

ROGGEMAN: No, sir, I am not.

TROOPER MOORE: Okay.

ROGGEMAN: I smoked after I got off work, a little bitty bowl, and that was it.

TROOPER MOORE: Okay.

ROGGEMAN: And then I started working on my truck.

TROOPER MOORE: Okay. Well, why don't we do first things first here. I'm just going to write you a reminder that you need to -- you do need to get that muffler fixed, okay?

ROGGEMAN: Yes, sir.

TROOPER MOORE: No fine with that one, just a reminder. Signature by the red star in the middle, if you would, though.

ROGGEMAN: How many days does that give me to --

TROOPER MOORE: Oh, it says seventy-two hours, but I realize that money doesn't grow on trees.

ROGGEMAN: Signature right here?

TROOPER MOORE: Right by the red star. Okay.

I realize that money doesn't grow on trees, so. . . . The sooner, the better, is what we'd like to see, but --

ROGGEMAN: If it saves getting pulled over, I'll get her fixed right away.

TROOPER MOORE: Exactly. Like I said, just on the back here, it says seventy-two hours, but, you know, whenever you -- whenever's convenient for you, okay?

ROGGEMAN: Okay.

TROOPER MOORE: And when you do get that fixed, if you would, sign and date the back, put a stamp on it and send it back to us, so we know that you got that taken care of, okay?

ROGGEMAN: All right.

TROOPER MOORE: All right. Like I said, since you're being decent with me, I'm going to cite you into court, okay? Let me get some paperwork here out of my briefcase. Okay.

[Pause.]

DISPATCH: Belmont, 36, over.

TROOPER MOORE: Go ahead, Belmont.

DISPATCH: The vehicle's to him on a tan Dodge, [unintelligible] entries positive.

TROOPER MOORE: Ten four. Prior one twenty-four?

DISPATCH: Negative. Ten ten, and theft.

TROOPER MOORE: Ten four.

ROGGEMAN: What does that mean, theft?

TROOPER MOORE: I just checked your criminal history.

ROGGEMAN: I haven't had anything for fifteen years.

TROOPER MOORE: It goes back as long as you're alive.

ROGGEMAN: Well, I do got stuff on there.

TROOPER MOORE: Yeah.

ROGGEMAN: From when I was younger.

TROOPER MOORE: It goes back as long as you're alive, Greg.

ROGGEMAN: I know that well. It follows you forever. I wish I'd have listened to my parents when I was younger. Thought they was the dumb ones.

TROOPER MOORE: I think a lot of people say that when they get older. They realize their parents weren't as dumb as they thought they were. I know there's a couple of things I wish I'd listened to my parents on.

[Pause.]

Flip that over for me just a sec, let me see what time it is on that. Okay. Thank you.

[Pause.]

What's a better court date for you, the 14th or the 21st?

ROGGEMAN: 21st.

TROOPER MOORE: 21st? That will be at 9:00 in the morning.

ROGGEMAN: Okay.

TROOPER MOORE: Dated the 7th. [Pause.] Okay. First things first here, Greg. The first one is for the possession of marijuana. Set you a court date for the 21st at 9:00 in the morning at the Cerro Gordo County Courthouse here in Mason City. Need a signature by the black "X" there. The signature ensures that you will show up in court that morning or they will issue a warrant, which you don't want.

ROGGEMAN: Never had one of them. I always show up.

TROOPER MOORE: Okay, that's good.

ROGGEMAN: I don't believe in messing around.

TROOPER MOORE: I appreciate that. I wish a lot of people that I deal with would respect that as much.

ROGGEMAN: It just adds to your problems.

TROOPER MOORE: Exactly. I'm going to darken the court date and time on this one for you, right there at the bottom. There's one.

The next one's going to be for the drug paraphernalia, the pipe. I'm going to set them both on the same day, okay?

ROGGEMAN: Yep.

TROOPER MOORE: Kill two birds with one stone there.

ROGGEMAN: Now when I -- for that date, when I show up, can I -- is that the date I can plead guilty [unintelligible] that date?

TROOPER MOORE: You can do whatever -- Exactly. It'll be your preliminary hearing.

ROGGEMAN: Okay.

TROOPER MOORE: You'll see a judge that day.

[Pause. Radio traffic.]

All right. The second one's for the bowl you got there, [unintelligible due to radio] paraphernalia. Same date, 21st, nine o'clock in the morning. Sign right there --

[Radio traffic.]

-- signature by the red -- or black "X" there, if you would.

Let me give you back your insurance card also here. We'll get the current one put in there. That's your copy there. That's your copy.

Nothing further on you or in the truck --

ROGGEMAN: No, sir.

TROOPER MOORE: -- that I need to know about? I'm going to look, obviously, since I did get that stuff off your person. Why don't you step up to the front of the vehicle with me and I'm going to check, and I'll get you on your way, okay?

Step out here for me, if you would. [Roggeman can be seen walking in front of the camera.] Show me what you've got in your pockets.

[Roggeman empties his pockets onto hood of patrol car.

Unintelligible words as he lays things out.]

ROGGEMAN: Ain't nothing in there (indicating).

TROOPER MOORE: What was in it?

ROGGEMAN: They're empty. They're empty.

TROOPER MOORE: What've you got all these for?
[Apparently referring to the baggies.]

ROGGEMAN: I had a [unintelligible] in the seat of the car.

TROOPER MOORE: That makes me suspect.

[Roggeman continues pulling things from his pockets.]

ROGGEMAN: (Unintelligible.)

TROOPER MOORE: Nothing in the truck?

ROGGEMAN: No, sir. You want to check the truck?

TROOPER MOORE: Well, I'm going to check the truck. Why don't you stay right here. I want to look in your pockets now, whatever you've got in there. Get your hands out of there. (Unintelligible.) Nothing in there?

ROGGEMAN: No.
TROOPER MOORE: What's this? That's a rock of meth. Okay.

ROGGEMAN: (Unintelligible.)

TROOPER MOORE: What are the baggies for?

ROGGEMAN: I had them in the truck tonight for some nuts and bolts.

TROOPER MOORE: Nuts and bolts?

ROGGEMAN: Yeah. That's a fact.

TROOPER MOORE: You know what?

ROGGEMAN: I'm serious, I ain't lying to you at all. There is nothing in that truck.

TROOPER MOORE: Well, you've been lying to me here. You didn't tell me about this rock of meth in your pocket.

ROGGEMAN: I didn't even know I had that in my pocket.

TROOPER MOORE: That's an eightball right there. There's a couple of eightballs there.

ROGGEMAN: No, that's for personal use. There's a gram there, if you (unintelligible).

TROOPER MOORE: That's a good eightball right there. (Unintelligible) . . . baggies. Okay. We're going to be straight here. Anything at your house I need to know about?

ROGGEMAN: No, sir.

TROOPER MOORE: No large amounts of dope there?

ROGGEMAN: Just my wife and my kid.

TROOPER MOORE: Okay.
ROGGEMAN: I don't deal at all. I got busted in 1985, and I ain't done it since. I use and that's it.

TROOPER MOORE: What are those baggies for then?

ROGGEMAN: I had them extra for me.

TROOPER MOORE: Take your shoes off for me.

ROGGEMAN: Yes, I will.

[Roggeman bends down and removes his shoes.]

TROOPER MOORE: 'Cause you know what, Greg, right now, you are treading --

ROGGEMAN: I got nothing in my shoes at all, I ain't got nothing in my house, I ain't got nothing in my truck. I'll unlock the tool box for you.

TROOPER MOORE: Okay. Take your socks off for me, turn them inside out.

ROGGEMAN: Okay. (Complies.)

TROOPER MOORE: Go ahead and put your shoes back on.

ROGGEMAN: You want to take these (indicating his socks) or --

TROOPER MOORE: No, turn them inside out, if there's anything in them.

[Roggeman puts his socks and shoes back on; Trooper Moore walks up to driver's side door of truck, opens door, searches inside of truck. Roggeman waits in front of patrol car, leaning against hood.]

[Trooper Moore found more methamphetamine in the truck, in the bottom of a cigarette pack, and also a joint. He came back to the car, told Roggeman he had lost patience with him, told him to put his hands behind his back, and placed him under arrest for possession of methamphetamine with intent to deliver, and possession of marijuana. Then the following exchange took place.]

TROOPER MOORE: Anything at your house?

ROGGEMAN: No, sir.

TROOPER MOORE: You might as well be straight before I go in and kick the door down.

ROGGEMAN: Nope. There's nothing there at all, not a damn thing.

TROOPER MOORE: Not a damn thing.

ROGGEMAN: Not a damn thing at all.

TROOPER MOORE: You just told me that there was nothing in your car.

ROGGEMAN: There -- I didn't think there was, sir.

TROOPER MOORE: You just told me you knew that joint was there. You need to quit your lying.

ROGGEMAN: There is nothing in my house.

TROOPER MOORE: Well, you know what, I'm going to go look.

[Trooper Moore goes back up to the truck and searches some more; then calls in to base. At 27:26, audio shuts off. Roggeman is still leaning on the front of the patrol car. At 32:30, the audio comes back on, and Trooper Moore is talking to Roggeman.]

TROOPER MOORE: Whose shop were you at tonight?

ROGGEMAN: I told you, Bill Wagner.

TROOPER MOORE: Bill Wagner's?

[They have a conversation about locating the key to the tool

box.]

TROOPER MOORE: Any other surprises I'm going to find when I open this up?

ROGGEMAN: (Shakes head from side to side.)
TROOPER MOORE: No more dope?

ROGGEMAN: (Shakes head from side to side.)

Narrative Description of remainder of tape:

Trooper Moore opens the tool box; asks Roggeman about a lantern; shuffles tools around; steps into truck bed and continues looking through tool box. Pulls out a smaller tool box and looks through it. While he's searching the tool box, the camera picks up people walking around in front of the truck, walking back and forth in the area. (The whole time of the traffic stop, there's been light vehicle traffic in both directions.)

In the truck tool box, Trooper Moore finds a big bag of something he says is used to cut methamphetamine. Roggeman says he didn't know that was in there, to which Trooper Moore replies that he may be young, but he wasn't born yesterday. Trooper Moore asks someone off screen a question -- no other officers are present, so this may be where Roggeman said the trooper talked to one of the people in the area.

Roggeman says, again, that is all the dope he has, and there is nothing in his house. Trooper says he is going to take Roggeman's word for it so he does not have to wake up Roggeman's child. Roggeman says, again, he just uses drugs, he does not deal. He says he had a gram-and-a-quarter, total, of methamphetamine, and a quarter ounce of pot. Trooper doesn't believe him; says he has seen methamphetamine before, and there is more than a gram in the one baggie. Trooper continues to search the tool box.

Trooper finally puts Roggeman back in the patrol car. Audio goes off again at 46:33, and comes back on at 49:00, when Dispatch calls. Trooper has brief conversation about having the truck towed. Next audible is at 50:24 -- about three words, unintelligible. Then no audio again until 51:18, when Dispatch calls back with a tow number. Then tape goes off for a second or two, and Trooper is back talking to Dispatch, getting the tow number. Gets VIN number from Dispatch. Tow truck shows up almost immediately thereafter. Trooper has conversation with driver, but only the patrol car's inside microphone is on, so outside conversations are inaudible.

Trooper Moore picks up all the stuff off the hood that Roggeman had taken from his pockets. Video quality becomes very poor, due either to fog or rain. The truck is finally towed away. At 58:28, Trooper Moore has a conversation with Roggeman about having someone put Roggeman's keys in his mailbox because his wife needs the keys. They will put Roggeman's keys in the mailbox, and then he can call and tell his wife they are there.
At 59:15, Trooper Moore is back in the patrol car. Calls in to Dispatch, says he's heading to Cerro Gordo County, gives his mileage, and takes off. Talks to Roggeman about who he lives with. Asks how long he's been back into dealing. Roggeman says he doesn't deal. Moore says, "That's a lot of dope to be using." They arrive at Cerro Gordo County in about two minutes, and wait for a Cerro Gordo County officer to show up. He finally shows up, lets them into the lot, and the tape ends.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 01-1738

United States of America,	*	
	*	
Appellant,	*	
	*	Order Denying Petition
v.	*	for Rehearing and for
	*	Rehearing En Banc
GREGORY ROGGEMAN,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge McMillian would grant the petition for rehearing en banc.

Judge Melloy took no part in the decision in this matter.

(5128-010199)

March 29, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit